A60 SEPT. 1964

Supreme Court of New Jersey

Docket No. M-16.

STATE OF NEW JERSEY

vs.

SYLVESTER JOHNSON and STANLEY CASSIDY,

Petitioners.

CRIMINAL ACTION.

ON APPEAL FROM JUDGMENTS OF THE CAMDEN COUNTY COURT, LAW DIVISION (CRIMINAL).

Joint Appendix

FILED
OCT 23 1964
CLERK

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Court House,
Camden, New Jersey.

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Camden, New Jersey,
Attorney for Petitioners.

Sat below:

R. COOPER BROWN,
J. C. C. (Temporarily Acting as Assignment Judge.)

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Joint Appendix

PETITION FOR POST-CONVICTION RELIEF.

(Filed August 6, 1964.)

The petition of Sylvester Johnson and Stanley Cassidy respectfully shows:

1. That they are presently detained and imprisoned in the New Jersey State Prison at Trenton, New Jersey, by Howard Yeager, the Principal Keeper of the State Prison, by virtue of a judgment and death sentence pronounced upon them by the Superior Court for the County of Camden, on January 28, 1959, by Judge Edward V. Martino, J. S. C.

2. That they were convicted in violation of the Fifth and Fourteenth Amendments to the United States Constitution in that the court charged the jury concerning their failure to take the witness stand and testify:

> "If any inculpatory or incriminating facts are testified to which concern the acts of that particular defendant which he could by his oath deny, his failure to testify in his own behalf raises an inference that he could not truthfully deny those inculpatory or incriminating facts" (707a)*

This was underscored by the argument of the prosecutor, who said:

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*3-Volume Joint Appendix are referred to in paragraph 10 (3) hereof.

". . . where the defendants refuse to take the stand in their own defense, that from their failure to testify in their own behalf, you, the jury, may infer that they could not truthfully deny the incriminating facts that were proved against them" (632a).

This matter was exacerbated in the extreme when the prosecutor later declared:

"Ladies and Gentlemen, now I hear, and now I understand why they said nothing last Friday when they opened, why these attorneys didn't make any claim for the defense. Now it is crystal clear. Now they finally admit it. What was there to deny? The State has proven a clear case. The defendants had confessed to it. We merely are here as observers. This is the situation and now they don't even take the opportunity to get on the stand. Who speaks for these defendants? Are the attorneys speaking for the defendants? And why shouldn't the defendants speak for themselves; when someone says that he is sorry, why don't we have the opportunity to hear whether or not they are sorry? This they denied themselves. They denied it to you and to everyone else, the opportunity to hear for themselves. Wouldn't this have indicated some sorriness on their part? They wouldn't expose themselves on the stand. They didn't dare get on the stand. They would rather hide behind some self-serving statement snatched out of context or otherwise in a confession. They didn't dare take the stand and bare their breasts and say we are sorry" (680-681).

This deprived petitioners of their constitutional privilege against self-incrimination and renders their convictions and death sentences void.

3. That, during their interrogation and the taking of their confessions, petitioners were at no time advised of their right to counsel, were never given the opportunity to seek counsel, were held incommunicado from family and friends who might have assisted in obtaining counsel, and were thus effectively denied the assistance of counsel during the most critical stage of the criminal proceedings against them, in violation of the guarantees of the Constitutions of the State of New Jersey and the United States.

4. That petitioner Cassidy was unlawfully arrested at his home, 312 Pine Street, Camden, New Jersey, at 4:00 A. M., on January 29, 1958. Included among the arresting officers were Captain Philip Large, Lieutenant Vincent Conly, Sergeant Harry Tracy, and Detectives William O'Brien, Golden Sunket and William Large. The arresting officers took petitioner Cassidy into custody without a warrant for his arrest and in the absence of any circumstances that would permit arrest without a warrant. Thereafter, without a warrant, they searched the premises at 312 Pine Street, and subjected petitioner Cassidy to intensive interrogation. As a result, five hours later, they obtained from petitioner Cassidy a confession, which was introduced into evidence against him at his trial. The use by the prosecution of this confession, which was the product of the unlawful arrest and illegal search, renders his conviction illegal and void under the Constitutions of the State of New Jersey and the United States.

5. That petitioner Cassidy was deceived and induced to turn over a gun to the police authorities as a result of the false statement of the prosecutor that the investigating officers merely wanted to determine whether or not the gun

had been fired and the further false promise by the prosecutor that the gun would not be introduced into evidence. The gun was used as evidence by the prosecution, thereby depriving Cassidy of a fair trial, in violation of the Constitutions of the State of New Jersey and the United States.

6. That petitioners were tried with a co-defendant, Wayne Godfrey, who had made a lengthy confession explicitly involving petitioners in an armed robbery-murder, for which they were convicted; that the confession was introduced into evidence at the trial; and that the confession has been held involuntary and coerced by the United States Court of Appeals for the Third Circuit. 327 F. 2d 311. The impact of a confession upon a jury is so great that, despite instructions limiting Godfrey's confession to his case, there must necessarily have been prejudice to petitioners through the prosecution's use of a coerced confession of a co-defendant. Petitioners were thereby deprived of a fair trial, as guaranteed by the Constitution and laws of New Jersey, and the Constitution of the United States.

7. That the prosecution obtained from petitioners' confessions that were the product of the coerced confession of Wayne Godfrey, a co-defendant whose confession was held involuntary by the United States Court of Appeals for the Third Circuit. 327 F. 2d 311. Petitioners' confessions were derived by the police authorities from the coerced confession of Godfrey, who was arrested first and held for interrogation fourteen hours before petitioner Cassidy was taken into custody and twenty-seven hours before petitioner Johnson was arrested. The same interrogating officers used the information they had unlawfully extracted from Godfrey to identify, locate, and obtain the confessions of peti-

tioners, thereby depriving them of due process of law, as guaranteed by the Constitutions of the State of New Jersey and the United States.

8. That petitioners were unlawfully detained and interrogated by the police authorities in violation of New Jersey Revised Rule 3:2-3, which provides that any person arrested shall be taken before a judicial officer promptly and provides further that the judicial officer shall advise the prisoner of his constitutional rights, including the right to remain silent and the right to counsel. The prosecutor has declared, during oral argument before the Court of Appeals for the Third Circuit, in a case involving these relators, that this rule is not obeyed because the Supreme Court of New Jersey has failed to provide any sanction for violation of the rule. Important rights of citizens are thus nullified. The only sanction possible in the circumstances is to exclude the fruits of the illegal detention. Petitioners' confessions were obtained during a period while the interrogating officers were violating Revised Rule 3:2-3. The use of those confessions as evidence should therefore render their convictions void.

9. That petitioners were deprived of Due Process of Law in violation of the Fourteenth Amendment to the Constitution of the United States and the laws of New Jersey by the extremely prejudicial summation of the prosecutor. In his address to the jury, the prosecutor grievously distorted the facts by asserting that the evidence proved the defendants had planned in advance to murder Edward Davis. One of his more gruesome allusions was to the frustration experienced by the defendants when their victim failed to die quickly. The prosecutor even intimated that the defendants conceded premeditating homicide.

Further, the prosecutor argued for a death sentence on patently improper grounds, namely, that the death of these defendants would deter other would-be violators; the prosecutor threatened the jury that anything less than a death sentence would place the jury's stamp of approval on murder and armed robbery and would condone killings, returning the law of the jungle to New Jersey. The entire summation was larded with what the prosecutor chose to call the "parlance of the underworld".

The tenor of the summation, its flat assertion of facts not established by evidence, and its invocation of the theory of deterrence to justify death sentences, operated to deprive petitioners of Due Process of Law in violation of the laws of New Jersey and the Constitution of the United States.

10. The history of the litigation in this case is as follows:

(1) The petitioners were tried and a judgment and death sentence placed upon them on January 28, 1959.

(2) Sylvester Johnson was represented at the trial by Elmer Bertman, Esq., of Camden and Stanley Cassidy was represented at the trial by Louis N. Caggiano, Esq. Both of these attorneys were retained by the defendants' respective families.

(3) The conviction was appealed and all three defendants were represented by E. Stevenson Fluharty, Esq., who was assigned and had represented Wayne Godfrey at the trial. 31 N. J. 489, 158 A. 2d 11 (S. Ct. N. J. No. 2839, 1960).

(4) Edward Kent, Esq., of Willingboro, New Jersey, was retained as attorney for Cassidy, Johnson and Godfrey and

obtained an order in the New Jersey Supreme Court granting a hearing on the basis of alleged newly discovered evidence. The trial court after a hearing in which the defendants were represented by Edward Kent, Esq., denied the request for a new trial, 63 N. J. Super. 16, 163 A. 2d 593.

(5) In connection with the preparation for the appeal, Stanford Shmukler, Esq. and Curtis Reitz, Esq., were retained. The New Jeresey Supreme Court affirmed the trial court: 34 N. J. 212, 168 A. 2d 1 (Feb. 6, 1961).

(6) Certiorari was denied by the United States Supreme Court: 368 U. S. 933 (1961).

(7) On October 17, 1961, M. Gene Haeberle, Esq., was substituted in place of Edward Kent, Esq., and thereafter M. Gene Haeberle, Esq., of Camden, New Jersey, in association with Curtis Reitz, Esq. and Stanford Shmukler, Esq., of Philadelphia, Pa., represented Johnson, Cassidy and Godfrey in all matters until the date hereof. From October 17, 1961, the three aforementioned attorneys (M. Gene Haeberle, Esq., Curtis Reitz, Esq., and Stanford Shmukler, Esq.) were neither assigned, retained, nor paid for their services, but they pursued the matter because they felt it was incumbent upon them as members of the bar.

(7) A motion for a new trial based on the holding of *State v. Mount*, 30 N. J. 195, 152 A. 2d 343, was made on offer of evidence and was denied by the trial court, 71 N. J. Super. 506, 177 A. 2d 312 (Law Division 1962).

(8) The action of the trial court in denying the new trial was affirmed: 37 N. J. 19, 179 A. 2d 1 (February 26, 1962).

Petition for Post-Conviction Relief

(9) On March 7, 1962, *a Clemency Hearing and Reprieves were granted* by Richard J. Hughes, Governor of New Jersey until April 12, 1962.

(10) Certiorari was denied by the United States Supreme Court: 370 U. S. 928 (1962).

(11) On June 26, 1962, in the United States District Court, petitions for Federal Habeas Corpus were filed.

(12) On June 26, 1962, motions for permission to interview jurors and other relief were filed in the United States District Court.

(13) On July 31, 1962, there was an oral order of Judge Lane which denied petitions for Habeas Corpus, motions and other relief, on the basis that the defendants had failed to exhaust New Jersey State Court remedies.

(14) On August 15, 1962, there was filed an order of denial of all relief by Judge Lane, U. S. D. J.

(15) On August 16, 1962, petitions for Habeas Corpus and motions for permission to interview jurors were filed in the New Jersey State Court.

(16) On August 22, 1962, order denying relief was entered by Judge Martino, J. S. C. There was no published opinion.

(17) The New Jersey Supreme Court affirmed Judge Martino's action on October 1, 1962 at 38 N. J. 319, 184 A. 2d 641.

Petition for Post-Conviction Relief

(18) On October 24, 1962, petitions for Habeas Corpus and motion for permission to interview jurors were renewed in the Federal District Court.

(19) On October 24, and October 26, 1962, Judge Lane entered orders denying the petitions for Habeas Corpus, motions and other relief.

(20) On November 29, 1962, appeals were perfected and docketed in the United States Court of Appeals for the Third Circuit.

(21) On April 24, 1963, appeals were argued in the United States Court of Appeals for the Third Circuit. A reargument was ordered and held on November 18, 1963, and on January 24, 1964, the court granted a new trial because of a coerced confession as to Wayne Godfrey, but denied new trials as to Sylvester Johnson and Stanley Cassidy. Circuit Judge Ganey dissented as to the affirmance on Stanley Cassidy believing that Stanley Cassidy's confession was coerced: 327 F. 2d 31 and 327 F. 2d 320 (January 24, 1964).

(22) Application for Certiorari was denied by the United States Supreme Court, on June 15, 1964, Mr. Justice Douglas dissented: 84 Supreme Court 1882.

11. None of the contentions advanced in this petition was raised in any of the prior proceedings. Each contention rests upon a recent development in the law or a newly established fact.

(a) The contention in Paragraph 2, claiming violation of the privilege against self-incrimination, rests upon the de-

cision of the Supreme Court of the United States in *Malloy v. Hogan*, 84 Sup. Ct. 1489, decided June 15, 1964. This case held, for the first time, that the Fifth Amendment privilege against self-incrimination is applicable through the Fourteenth Amendment to the States. And see *Stewart v. United States*, 366 U. S. 1 (1961).

(b) The contention in Paragraph 3, claiming that the petitioners were deprived of their right to counsel, rests upon the decision of the Supreme Court of the United States in *Escobedo v. Illinois*, 84 Sup. Ct. 1758, decided June 22, 1964. This case held, for the first time, that the guarantee of the right to counsel applies to the interrogation stage of a criminal proceeding. And see *Massiah v. United States*, 84 Sup. Ct. 1199, May 18, 1964.

(c) The contention in Paragraph 4, claiming that petitioner Cassidy's confession was inadmissible because it was the product of illegal arrest and detention, rests upon the decisions of the Supreme Court of the United States in *Ker v. California*, 374 U. S. 23 (1963); *Traub v. Connecticut*, 374 U. S. 493 (1963), and *Wong Sun v. United States*, 371 U. S. 471 (1963). The facts surrounding the illegality of Cassidy's arrest have never been established of record. This explains, perhaps, the denial of the petition for certiorari in which this contention was inserted. 84 Sup. Ct. 1890 (No. 1322, Misc., 1964).

(d) The contention in Paragraph 5, claiming violation of Cassidy's rights through the use of the gun fraudulently obtained from him, has not previously been raised. It was discussed, however, by the United States Court of Appeals for the Third Circuit in the prior federal habeas corpus proceeding. 327 F. 2d 311.

(e) The contentions in Paragraphs 6 and 7 derived from the determination that the confession of co-defendant Godfrey was involuntary and inadmissible. This determination made by the United States Court of Appeals for the Third Circuit, 327 F. 2d 311, came in the federal habeas corpus proceeding which terminated on June 15, 1964. 84 Sup. Ct. 1882.

(f) The contention in Paragraph 8, claiming a violation of N. J. R. R. 3:2-3, has not been raised heretofore. It is especially timely in light of determinations by other States to render inadmissible confessions taken during a period of illegal detention. E.g., *People of New York v. Donovan*, —— N. Y. N. E. 2d —— (——).

(g) The contention raised in Paragraph 9, claiming a violation of petitioners' constitutional rights by the prosecutor's summation, is raised here for the first time in the context of the Federal and State Constitutions. On Appeal from the conviction, the New Jersey Supreme Court directed that the summation question be briefed and argued; in light of the procedural situation, the State Supreme Court did not reverse on this ground. *Johnson v. State*, 31 N. J. 489, 158 A. 2d 11, 22 (1960). The failure of defense counsel to make immediate objections and to preserve the question for appeal should not bar this constitutional issue from being decided on its merits. See *Fay v. Noia*, 372 U. S. 391 (1963).

WHEREFORE, petitioners pray that they be allowed to proceed without payment of filing fees and for the assignment of counsel under Rule 3:10A-6(a); that a hearing be set to hear and determine the issues of fact that are raised;

Application for the Assignment of Counsel

that petitioners be authorized to employ the normal discovery devices of civil litigation to marshal the proof requisite for this hearing; and that, after a full and complete hearing on the legal and factual contentions, this Court relieve petitioners of the unlawful and unconstitutional detention, imprisonment, and sentences of death; and that the Court grant such other, further, and different relief as to the Court may deem just and proper in the circumstances, and a stay for the warrant of execution entered July 31, 1964.

STANLEY CASSIDY,
SYLVESTER JOHNSON.

APPLICATION FOR THE ASSIGNMENT OF COUNSEL.

1. I am one of the defendants in the above entitled criminal cause of action.

a. I have heretofore been given leave to file and to appeal as an indigent in the State Courts of New Jersey and in the United States Federal Courts on the basis of a verified petition setting out the facts establishing my indigency.

2. Neither myself nor my family is able to pay to retain counsel to defend me in this matter.

WHEREFORE, petitioner prays:
That this Honorable Court assign counsel to represent him on this petition for post-conviction relief and for any appeal thereof should that be necessary, without fees or costs to the petitioner.

SYLVESTER JOHNSON.

Application for the Assignment of Counsel

State of New Jersey
County of Mercer } ss.

Sylvester Johnson, being duly sworn according to law, upon his oath, deposes and says:

1. I am one of the petitioners in the above entitled action.

2. I have read the foregoing petition and the same is true to my own knowledge.

3. This affidavit is made to inform the Court as to my status of indigency and to induce the Court to assign counsel to represent me as an indigent defendant in connection with the petition for post-conviction relief under R. R. 3:10A-1 and R. R. 3:10A-6(a).

4. In making this affidavit I am aware that false swearing is a misdemeanor and that the punishment for false swearing is a fine of not more than $1000 or imprisonment for not more than three years or both.

SYLVESTER JOHNSON.

Subscribed and sworn to before me, this 6th day of August, 1964.

M. GENE HAEBERLE,
Attorney at Law of the State
of New Jersey.

Application for the Assignment of Counsel

APPLICATION FOR THE ASSIGNMENT OF COUNSEL.

1. I am one of the defendants in the above entitled criminal cause of action.

a. I have heretofore been given leave to file and to appeal as an indigent in the State Courts of New Jersey and in the United States Federal Courts on the basis of a verified petition setting out the facts establishing my indigency.

2. Neither myself nor my family is able to pay to retain counsel to defend me in this matter.

WHEREFORE, petitioner prays:

That this Honorable Court assign counsel to represent him on this petition for post-conviction relief and for any appeal thereof should that be necessary, without fees or costs to the petitioner.

STANLEY CASSIDY.

State of New Jersey }
County of Mercer } ss.

Stanley Cassidy being duly sworn according to law, upon his oath, deposes and says:

1. I am one of the petitioners in the above entitled action.

2. I have read the foregoing petition and the same is true to my own knowledge.

Order

3. This affidavit is made to inform the Court as to my status of indigency and to induce the Court to assign counsel to represent me as an indigent defendant in connection with the petition for post-conviction relief under R. R. 3:10A-1 and R. R. 3:10A-6(a).

4. In making this affidavit I am aware that false swearing is a misdemeanor and that the punishment for false swearing is a fine of not more than $1000 or imprisonment for not more than three years or both.

STANLEY CASSIDY.

Subscribed and sworn to before me, this 6th day of August, 1964.

M. GENE HAEBERLE,
Attorney at Law of the State of New Jersey.

ORDER.

(Filed August 11, 1964.)

The Court having reviewed the petition of Sylvester Johnson and Stanley Cassidy for post-conviction relief, being the first application by these petitioners for relief under rule R. R. 3:10A and the Court being aware that warrants of execution were entered July 31, 1964, fixing the week beginning September 13, 1964 for the execution of each of the petitioners, and the said petitioners having requested the assignment of counsel under R. R. 3:10A-6(a), and the Court having recognized that the said petitioners have been recognized and are indigent;

Judgment

IT IS on this 11th day of August, 1964, ORDERED and ADJUDGED that M. Gene Haeberle, Esq., 518 Market Street, Camden, New Jersey, be and he hereby is assigned and appointed to represent Sylvester Johnson and Stanley Cassidy in connection with their petition for post-conviction relief and subsequent legal proceedings developing therefrom.

IT IS FURTHER ORDERED and ADJUDGED that oral argument only be held on the petition for post-conviction relief on Friday, August 14, 1964, at 9:30 A. M., in the Court House, in the City of Camden.

R. COOPER BROWN,
J. C. C.,
Temporarily Acting as Assignment Judge.

JUDGMENT.

(Filed August 17, 1964.)

This petition for post-conviction relief pursuant to R. R. 3:10A-1, et seq., having been opened to the Court by Gene Haeberle, assigned attorney for petitioners, and Norman Heine, Prosecutor of Camden County, appearing for respondent State of New Jersey, and the Court upon the State of New Jersey's motion for dismissal of the petition, having heard and considered the respective oral arguments of the parties and having made pursuant to R. R. 3:10A-1 findings of fact and conclusions of law,

Notice of Appeal

IT IS ON THIS 14th day of August, 1964, ORDERED and ADJUDGED that the respondent's motion to dismiss the petition be granted and the relief sought in the petition for post-conviction relief be denied.

IT IS FURTHER ORDERED and ADJUDGED that the petitioners prayer for a stay from the warrant of execution entered July 31, 1964, is denied.

/s/ R. COOPER BROWN,
J. C. C.,
Temporarily Acting as Assignment Judge.

NOTICE OF APPEAL.

(Filed September 11, 1964.)

To: Norman Heine, Esq., Prosecutor of Camden County.

Notice is hereby given that Sylvester Johnson and Stanley Cassidy appeal to the Supreme Court of New Jersey from all of a certain judgment entered in this matter, dated August 14, 1964, signed by the Honorable R. Cooper Brown, J. C. C., temporarily acting as assignment judge, J. S. C.

/s/ M. GENE HAEBERLE,
Attorney for Petitioners, Sylvester Johnson and Stanley Cassidy.

Dated: September 11, 1964.

Notice of Appeal

State of New Jersey }
County of Camden } ss.

Veronica E. Dalton, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am an employee in the office of M. Gene Haeberle, Esq., Attorney for Petitioners, in the above entitled cause of action.

2. On Friday, September 11, 1964, I served the within Notice of Appeal upon Norman Heine, Esq., Harry Bateman and Hon. R. Cooper Brown, by enclosing copies thereof in envelopes addressed as follows: Norman Heine, Esq., Court House, Camden, N. J.; Hon. R. Cooper Brown, Court House, Camden, N. J. and Harry Batemen, Court House, Camden, N. J. and sent the same by certified mail, return receipt requested, on which the postage was prepaid.

VERONICA E. DALTON.

Sworn and subscribed to before me, this 11th day of September, 1964.

LILLIAN S. MIGALA,
Notary Public of New Jersey.

My Commission Expires August 11, 1969.

ARGUMENT.

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(1) August 14, 1964.

Before: R. COOPER BROWN, J. C. C.

PRESENT:

NORMAN HEINE, Esq., for the State of New Jersey.
M. GENE HAEBERLE, Esq., for the Defendants.

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(2) MR. HAEBERLE: If it pleases the Court, this is the date fixed by order of the Court for oral argument on a petition for post conviction relief of Sylvester Johnson and Stanley Cassidy.

Approximately a half hour ago I was given a copy of the State's brief in this matter.

THE COURT: Do you wish a continuance so you can study the brief?

MR. HAEBERLE: Well, I must say, your Honor, I haven't had the opportunity to check out the citations and all these cases.

Argument

THE COURT: If you think you are being prejudiced by this, the Court will continue the matter. The Court has no desire to force you on before you have had adequate time to prepare yourself. I am sure the Prosecutor doesn't either. I don't want the record to reflect that the Court is forcing you on against your will.

MR. HAEBERLE: Well, if it please the Court, I appreciate the Court's offer, but (3) my review of these cases indicates to me that they are not current cases. They are cases of many years past, with the exception of State vs. Smith, which was decided last month by our New Jersey Supreme Court, which I have had the opportunity to review through the kindness of your Clerk. Therefore, I don't request a continuance to meet these cases. I believe that I can answer them by argument.

THE COURT: All right.

MR. HAEBERLE: In the second point of the petition, the contention is raised bringing into light the charge of the Court, as well as the summation by the Prosecutor.

The summation by the Prosecutor is quoted at some length, and I think quite clearly that what the Prosecutor attempted to do, and what he did was to deprive the petitioners of their constitutional privilege against self-incrimination. He made specific mention and reference of their failure to take the stand, and he even went to infer why they didn't take the stand.

(4) In the Prosecutor's brief, reference is made under this point to Malloy vs. Hogan, a most recent decision of the United States Supreme Court, and I think that case has been cited in the petition, is relevant, and determinative on

this point. What the Prosecutor did is condemned by Malloy vs. Hogan.

Now, the citations that the State relies upon to support its position, is that the Prosecutor had a right to make a great point of the failure of the defendants to testify, had a right to use it against them; U. S. vs. Feinberg, which is cited in 140 F. 2d 592 (2nd Cir. 1944).

These cases, and the other cases cited in Louisiana and Pennsylvania are all decisions prior to Malloy vs. Hogan, and I respectfully suggest that the U. S. Supreme Court has now spoken definitively. These cases are neither good guideposts, nor do they represent the law.

THE COURT: What do you say that the Court said in the Malloy case, what was the final conclusion?

MR. HAEBERLE: Well, as I understand (5) it, your Honor, it would not be proper for the State to make mention of the fact that a defendant did not take the stand, and also to infer from the fact that he did not take the stand that his failure was in any way indicative one way or the other of his guilt or innocence.

THE COURT: Do you think the Court went so far to say the State could no longer comment on normal human processes and the reactions by saying the defendant was accused of doing a specific act, that he could have taken the stand and denied that he did that act, the Prosecutor couldn't even comment that the jury might consider that fact? Do you say the jury cannot use normal human thinking to weigh what effect, if any, that might have that they no longer could consider that it is a normal spontaneous human reaction to deny untrue facts when you are accused of them?

Argument

MR. HAEBERLE: I think under Malloy the Prosecutor doesn't have such a right.

THE COURT: You think that the Court went that far?

(6) MR. HAEBERLE: Yes, I do. However, the facts in this case are not the same facts as your Honor poses in the question. What the Prosecutor did was not merely comment that they failed to testify in their own behalf, he went on to say that they should speak for themselves; they didn't dare say they were sorry; that they didn't get on the stand and bare their breasts and say they were sorry. "They didn't dare get on the stand. They would rather hide behind some self-serving statement snatched out of context or otherwise in a confession. They didn't dare take the stand and bare their breasts and say we are sorry." That clearly calls for prejudice on the part of the jury, and to call it up in a way when the Prosecutor knows that the defendants had an absolute right to remain silent.

The question your Honor posed is not in this case. This is a very much aggravated case where the prosecution made a reference, and knowing that at this point, of course, they couldn't get on the stand, they had already (7) rested. It is not the same problem posed by the Court's question, and I think there ought not to be any doubt that Malloy vs. Hogan clearly goes so far as to condemn what happened in the trial of this case, and the Prosecutor's summation.

THE COURT: Do you interpret that decision to go so far as to prohibit the Prosecutor from saying the facts which he has proven as part of the State's case haven't even been refuted by these defendants?

MR. HAEBERLE: If your Honor please, that wasn't what he said. He went on to do more.

THE COURT: Let's take it a step at a time. You say he went further than that. He certainly started on that premise, didn't he?

MR. HAEBERLE: Yes.

THE COURT: Do you think that the decision went so far, to tell the jury I have proven so and so, and the defendants did not refute those facts, deny those facts?

MR. HAEBERLE: I think it did, your Honor. However, I think, perhaps, it is room (8) for dispute. I think that was the intent of the case to go that far. However, I think it is reasonably clear that it certainly went so far as to prohibit what the Prosecutor did under the facts of this case, when he made repeated reference to their failure to testify, and failure to even say they were sorry. I think that is much furthr than the question posed by the Court. I would suggest too, as pointed out in the Prosecutor's brief, that there are a number of jurisdictions, New Jersey being only a minority jurisdiction, which permits this comment at all, that the majority of the jurisdictions do not permit this comment by the Prosecutor.

THE COURT: You cite some Federal cases, but isn't it true that there has been for many years a Federal statute that prohibits it, and it was for statutory reasons that it was not allowed in the Federal Courts?

MR. HAEBERLE: Or in the State Courts, your Honor.

Argument

(9) THE COURT: Well, I haven't read the statutes of the State Court decisions you refer to, but it may be those States have a statute similar to the Federal statute, but does that set up constitutional grounds?

MR. HAEBERLE: I think it does now in light of Malloy vs. Hogan. I mean even prior to Malloy vs. Hogan, according to the language cited by the Prosecutor from the New Jersey Supreme Court case, State vs. Corby, "Only in a small minority of the States may comment be made by the trial court on a defendant's abstention from denying inculpatory facts tending to establish his guilt," and so forth.

I am merely suggesting to the Court, that even prior to Malloy vs. Hogan there were only a small number of States, and New Jersey was one, which allowed this comment by the Prosecutor.

THE COURT: The question was, is that a prohibition by statute, or one of Court rule based on constitutional grounds?

MR. HAEBERLE: I couldn't answer that (10) question.

Point three in the petition deals with during their interrogation and the taking of their confessions, petitioners were at no time advised of their right to counsel, and were never given the opportunity to seek counsel, and were held incommunicado from family and friends who might have assisted in obtaining counsel, and were thus effectively denied the very vital assistance of counsel at that time when it was most important to them, at the times, and during the taking of these so-called confessions.

If your Honor please, this fact that they were being held incommunicado, that they wanted counsel, that their family

and friends had tried to see them when they were in jail, and that they were denied the opportunity of counsel, and denied seeing their friends is a fact supported by an affidavit. There is no counter affidavit, or counter assertion, or any proof that they were allowed counsel or they were allowed to see friends.

(11) THE COURT: Does the proof go so far as to state that the defendants requested counsel, and that the request was denied?

MR. KAEBERLE: No, your Honor. I submit that this point three is verified by the affidavit of Stanley Cassidy and Sylvester Johnson.

I know your Honor has provided only for oral argument here. However, with the full hearing, the other relief being requested, I would call some of the friends and relatives of Stanley Cassidy and Sylvester Johnson.

As to Stanley Cassidy, these people, or some of the people, relatives, friends I would call Mrs. Mildred Cassidy, the mother, Mrs. Nettie Jones, Mrs. Vivian Rhone. I would also call Mrs. Bertha Loveland, and Mrs. Charles Gaines to show the efforts that they made; that they came into City Hall; that they went to the police station; that they tried to see Stanley Cassidy, and were denied any right to talk to him, and to the officers or other officials that they spoke to, they were denied the right to (12) speak to them. That would be a point in the hearing that I would hope to show by introducing their testimony.

THE COURT: What authority do you rely on which says the denial of the right of a defendant at this stage of the proceedings, and at the stage you are talking about, the

initial area, what authority do you rely upon that says that failure to permit defendants at that time to see members of his family or his friends denies him of his constitutional rights?

MR. HAEBERLE: Coupled with the fact that Stanley Cassidy himself wanted an attorney; coupled with the fact that ——

THE COURT: Wait a minute. I thought you told me a few minutes ago the proofs do not show he wanted an attorney but was not offered.

MR. HAEBERLE: In both respects, your Honor. In paragraph number three is sworn to as true by Cassidy. In other words, I am making ——

THE COURT: Assuming for the purpose of this argument that affidavit is true. That (13) affidavit doesn't say that he wanted counsel and he was deprived the right of counsel when he requested it. Isn't that what the affidavit says?

THE PROSECUTOR: He didn't even go that far.

THE COURT: Giving it its broadest construction favorable to the defendant.

MR. HAEBERLE: Well, the Prosecutor makes the point that relying on State vs. Smith, I believe it was decided July 7, 1964, that there is no indication ——

THE COURT: I have that decision before me now.

Argument

MR. HAEBERLE: There is no indication from this petition that there was refusal of counsel or he was denied the request to see counsel. I suggest that in answer to your question—the case I rely on is Escobedo vs. Illinois, where it is very pertinent to Stanley Cassidy. Cassidy was never convicted of a crime. As a matter of fact, he was never arrested before. Escobedo was a man who had (14) many brushes with the law, and I believe a number of convictions, and, perhaps, if there should be one who would know his rights, Danny Escobedo should, but he wasn't allowed the opportunity to contact a lawyer. Here we have a man who had no prior arrests, trial, interrogation or convictions, who was brought in, being a young boy, who by the record has a dependent passive type emotional background, then put into the meat grinder of a Prosecutor's office and a string of detectives to get a confession of him. You have him snatched out of his home about 5 o'clock in the morning, then taken down here and interrogated. Then you have following that the family trying to see him, and he being deprived to see his family. You have this complete ignorance of judicial process of his own rights.

Now, I think Stanley Cassidy is clearly the type case that Escobedo was. Under all the facts in the Escobedo case, it requires that Stanley Cassidy be given a new trial.

Now as to Sylvester Johnson, I would (15) call in this matter, Mrs. Geraldine Hatcher, Mrs. Allian Johnson and Mrs. Vernie Johnson, who are also present in Court.

THE COURT: For what purpose?

MR. HAEBERLE: For the same purpose, to show the efforts made by them to talk to Sylvester Johnson, and I would also call them in reference to the action they took

in trying to obtain counsel for Sylvester Johnson, and the delay in time for various reasons that they did not get to see Sylvester Johnson, and again, Sylvester Johnson was not advised of his right to counsel.

I think, again, under Escobedo vs. Illinois, the attention had to focus on them quite clearly. The Prosecutor knew who they were going to get and where they were going to get it.

I think, again, these witnesses who are present in Court, if the Court will grant opportunity for a full hearing, would substantiate the fact that they were denied access to Sylvester Johnson, and that Sylvester (16) Johnson wanted to have counsel.

The Johnson problem in this respect is somewhat different from Stanley Cassidy. Johnson's family ultimately retained counsel, and were actively engaged in trying to retain counsel from the moment that they were apprised of Johnson's arrest by newspapers and radio, but, again, they didn't have any opportunity to see Sylvester Johnson until after the prosecution had its way and obtained the so-called confessions.

Escobedo vs. Illinois requires a new trial both for Sylvester Johnson and Stanley Cassidy.

Mention has been made of point four, about the time of arrest of Cassidy.

Now, it has never been denied, although the State has not affirmatively admitted it, that they lacked a search warrant, that they lacked an arrest warrant.

In the State's brief they make the point that it doesn't matter, because they didn't seize any evidence which they used at (17) the trial from this unlawful arrest and search of Cassidy's home.

However, I would suggest to the Court that this goes—

this re-emphasizes the applicability of the Escobedo case, because here Stanley Cassidy who had no experience with the law, the police come banging through his house at 4 o'clock in the morning, take him out, they didn't say why they were doing it, what the reason for it was, searched the whole house, then take him down to the jail. I think that type of complete denial of sanctity of the home certainly has got to have an effect on the response Stanley Cassidy makes to these questions. He has no rights, the police can break into his house, arrest him, search his whole house, take him to jail; what is he going to expect? He is going to expect that he has no rights. He is going to do whatever the prosecution or police request of him.

THE COURT: Mr. Haeberle, do you contend that the State doesn't have reason to believe that this defendant committed this (18) murder at the time they arrested him 4 o'clock in the morning?

MR. HAEBERLE: I don't know what they had reason to believe.

THE COURT: All right. Then you are not disputing the fact. If they had reason to believe he committed this murder, did they have a right to arrest him 4 o'clock in the morning without a warrant under our practice?

MR. HAEBERLE: I don't know what facts they had, your Honor.

THE COURT: All right. You don't dispute it. I am going to have to assume that they did have reason to believe that he committed a crime, and under our practice they had

a right to make an arrest, and if the search was incidental to that arrest, the search was proper and reasonable under the constitution, was it not? If there were no articles seized and used at the trial, where was the unreasonable search and seizure under the most recent decisions of the United States Supreme Court?

MR. HAEBERLE: I would suggest, your (19) Honor, that the fact that they went without a warrant was unreasonable search and seizure.

THE COURT: You are not contending, are you, if a police officer has reasonable grounds to believe that a particular defendant commits a murder, they can't arrest him, they have to go get a warrant for his arrest and allow him to escape?

MR. HAEBERLE: No, your Honor, but I have no knowledge of what the background or information that they knew or they acted upon. As a matter of fact, that is one of the points that we would like to determine, what is the information that they acted upon.

I think one of the most significant aspects of this type action was the effect that it had on Stanley Cassidy. It could only be productive of him obeying whatever the State asked of him. They can bust into his house and run through the place, I think that has an effect on a man, a man who never had any prior exposure, and has limited intelligence.

Now, under point five, reference is (20) made to a point which Judge Hastie raised in the Third Circuit opinion dealing with the fact that petitioner Cassidy was deceived and induced to turn over the gun to police authorities as a

result of the false statement of the Prosecutor. Mention was made of this by the Third Circuit, but no opinion was expressed on it one way or the other. It hadn't been presented as a point of error before this time. The petitioner now raises this point that the gun was used as evidence by the Prosecutor, and that it was obtained by a false promise, and this point five is so verified by Cassidy.

Again, this point would be one that the petitioners with a full hearing would want to develop the facts so that your Honor could make a fair determination of it based on all the facts.

Also, as a result of the Third Circuit opinion written by Judge Hastie, Godfrey was tried at the same time as Johnson, and Wayne Godfrey's confession was held to be (21) coerced, and under a writ of habeas corpus it was ordered he be tried by October 15 of this year or be released.

Of course, Godfrey's confession was utilized and made part of the record at the same time as Johnson and Cassidy's confessions. Of course, until the Third Circuit decided that Godfrey's confession was coerced, it was not possible to raise the argument in either the State or the District Court that the use of the coerced confession of Godfrey prejudicially affected the trial of the other two men.

I think this is a more significant point, that since Godfrey's confession was coerced, and the record indicates that they used Godfrey's confession in obtaining the confession from Sylvester Johnson and Stanley Cassidy, therefore, these confessions of these two men are the fruit of this poison confession or poison fruit of a poison tree, that the confessions of Johnson and Cassidy should also be invalidated, because they are based upon and obtained through the use of the confession of (22) Wayne Godfrey.

As I say, it wasn't possible to make that argument until

the Third Circuit's decision holding Godfrey's confession coerced.

THE COURT: That may be so, but what further proof could you take now that isn't already in the record, that wasn't made at the time of the trial, both the hearing before Judge Martino to determine the admissibility of that, the voluntariness of that statement, and the subsequent proof in the presence of the jury, what further proof could you take now?

MR. HAEBERLE: As to this point, as to the point of use of the confession; you could make definitely clear by interrogating both Cassidy and Johnson the fact that they were shown this confession, that they were told that Godfrey had confessed, that they had a confession, they better talk; here's what Godfrey is going to do, you better do something. They made it absolutely crystal clear so there is no shadow of any doubt that Godfrey's confession was used to obtain confessions from (23) Cassidy and Johnson.

THE COURT: Only the testimony of the defendants is what you want to take?

MR. HAEBERLE: Yes, sir and ——

THE COURT: Couldn't that be done by affidavit on a motion of this kind?

MR. HAEBERLE: Well, perhaps it could, your Honor, but would also be the calling of supporting witnesses to verify the facts from the police officials and State officials who handled the interrogation to confirm the fact that they

did so use the confession of Godfrey to obtain confessions of Cassidy and Johnson. I would suggest there is some slight tendency not to place a great deal of weight upon the unsupported testimony of Cassidy and Johnson.

THE COURT: Wasn't all of that gone into thoroughly by Judge Martino, both in a preliminary fashion to determine the voluntariness of the statements, and also subsequently in the presence of the jury? That was all gone into in great detail.

MR. HAEBERLE: If your Honor please, (24) I think a lot of water has gone under the bridge in Washington as to the validity or invalidity of confessions.

THE COURT: You say you want a further hearing to develop facts. I am asking you what further facts are there to develop that haven't already been developed? Aren't they in the record for the Court to read?

MR. HAEBERLE: No, your Honor, not as to the facts—complete recital of the facts respecting the use of Godfrey's coerced confession. There is nothing in the record—I believe there is a passing mention from one police officer about the use of a confession. I won't represent that as a clear recollection, but I think that is so.

THE COURT: Do you have any knowledge?

MR. HAEBERLE: Let him admit it and say if the State is willing to admit they used Godfrey's confession, then we won't have to go into it.

Argument

THE COURT: Do you have any knowledge or information that the confession of Godfrey (25) was so used?

MR. HAEBERLE: I have been advised by Cassidy and Johnson that it was so used.

Therefore, on that ground, paragraph number six, the confessions of Godfrey and Johnson should be thrown out and a new trial granted. That also covers part of paragraph number seven.

Now, paragraph number eight deals with our present Revised Rule 2:3-3, which requires prompt arraignment. Without any shadow of a doubt, the Prosecutor, I am sure, would admit that there was no compliance whatsoever with this rule, that these defendants were in this very building interrogated several floors above, and were not given a prompt arraignment. Of course, that was one of the factors that mitigated the Third Circuit in holding the confession of Wayne Godfrey coerced.

THE COURT: Didn't the Third Circuit pass on this arraignment? Didn't they hold that the arraignment was proper in these two cases?

MR. HAEBERLE: No. The question was, (26) your Honor—it was taken up at length by Circuit Judge Ganey with the Prosecutor about the effect of this rule in New Jersey; what happens if a person's rights are violated under this rule, and the Prosecutor frankly and correctly stated that there is no relief for violation of this rule in New Jersey. It is a rule of Court, but there is no action to cover violations of it.

THE COURT: You mean untimely arraignment?

Argument

MR. HAEBERLE: Yes. What we suggest is that the only possible sanctions would be to exclude the fruits of it, which would be the confessions.

THE COURT: Isn't it the law in New Jersey by our decisions, that if you have not properly or promptly arraigned the defendant, that you held him up unduly long in taking statements or confessions from him, if the Court believes that that rule has been violated to the extent that the defendant has been denied his constitutional rights, the Court will find that the statements or confessions are (27) involuntary, and therefore prohibit the State from using it, isn't that one of the sanctions that we impose? Isn't a further sanction one that the Courts may use on motion by the defendant, either before trial, that he was denied his constitutional rights by improper or untimely arraignment, and therefore the State even before it gets to trial has committed a fatal error, and the defendant should be discharged on a writ of habeas corpus, isn't that a possible sanction?

MR. HAEBERLE: They are all possible, but I am not aware of any kind ——

THE COURT: If the trial judge doesn't see fit to do it, don't you have a right to immediate appeal to the Supreme Court to ask them to review the failure of the trial court to do it, isn't that a sanction that is built into those rules by our Supreme Court?

MR. HAEBERLE: Well, I would say they are possibilities that could be taken on these type of violations, but I am not aware of any case that has so applied any of the fine (28) ideas and sanctions that you have suggested.

Argument

THE COURT: I am not asking whether somebody has taken advantage of that right. Isn't that right very clear, and isn't that abundantly clear in a careful reading of the many decisions of our New Jersey Supreme Court in homicide cases? It seems to me it is.

MR. HAEBERLE: I would respectfully differ.

THE COURT: They may have waived that right under the recent State vs. Smith decision, which just came down last month.

MR. HAEBERLE: I would think that State vs. Smith in some degree is in conflict Fay vs. Noia, a United States Supreme Court decision.

If your Honor please, what the petitioners are asking for is a full hearing to set forth the facts so that a decision may be reached on these points. I suggest that some of these items are indicated by the present record, others are not, are not as adequately as they should be, and can be enforced with other (29) testimony. And that further that the petitioners are requesting the right to employ normal discovery devices of civil litigation to marshal the evidence, including interrogatories. I must admit I am aware of no authority for use of such civil rights in a manner of this kind, where we are dealing with two human lives in this case, that property rights should not have a greater right of discovery and expiration than in questions of obtaining facts when we are dealing with two lives.

THE COURT: Mr. Haeberle, I want to say to you there again you are suggesting that our rules are inadequate to protect the rights of individuals, and that I don't agree with

you on. It's not even in the record that counsel ever applied to the Court for discovery rights, and the Court does have the discretion under our rules to grant discovery rights where the ends of justice require it.

Now, our rules are abundantly clear on that. I think the Prosecutor can remember, that in lieu of that he furnish the (30) information because the Court said he will give you those discovery rights, because the Court has the discretionary right to enlarge the rules where the ends of justice require. We do it regularly.

No such application was made to the Court previously; is that right?

MR. HAEBERLE: That is my understanding, your Honor.

I have a set of proposed interrogatories which I would ask the Court to grant under the relief requested in this petition, if the Court will grant the full hearing requested by the petitioners.

If your Honor please, that concludes the remarks on behalf of the petitioners.

THE COURT: All right, Prosecutor.

THE PROSECUTOR: May it please the Court, I take it that the motion this morning not only encompasses the petitioners' oral argument on their petition for this post conviction relief, but contemplates the State's motion for dismissal of the petition, because (31) it is frivolous in part, it is sham in part, and in whole does not allege any grounds for any post conviction relief. I shall deal with these matters in seriatim.

I am aware that your Honor only a few minutes ago indi-

cated that you had the opportunity of reading the most recent decision of our Supreme Court decided on July 7, 1964, in the case of State vs. Edgar Smith. I believe that this is, probably, the first, or certainly the last word by our Supreme Court on post conviction proceedings, which now finds itself in a new rule of the Court, 3:10a-1 et seq.

Now, our Courts, I think, recognized that the philosophy of these post conviction proceedings should not run haphazard, but has attempted to coordinate and correlate all these proceedings into some uniform practice that will be understandable not only to the Prosecutors, but even to the Courts themselves. They promulgated these rules and embodied a lot of the post conviction proceedings that formerly applied, such as habeas corpus and the like, (32) into this general relief known as post conviction relief.

The Supreme Court in the Smith case laid down some very important ground rules which should apply to these applications for post conviction relief.

Now, what are these ground rules? They say that there are two. One rule is that the post conviction proceedings may not be used as a substitute for appeal from a judgment of conviction, because they say that all alleged errors in a trial should be asserted in a direct review from the conviction, and therein noted that the exception to this rule might be found in the concept of fundamental fairness in the constitutional sense which denied due process.

The second rule is that an issue even of constitutional dimensions that is once decided may not be re-litigated again in this type of post conviction relief proceedings.

I mention this because I think I will have occasion to refer to it from time to time in the course of my argument, and I would hope (33) that the Court would forgive me if I appear to be repetitious in again referring to this principle or that rule.

Argument

Now, the petition of the defendants Johnson and Cassidy is another argument. I don't know whether this is the tenth or eleventh act of this whole play. I think it is important for the record to indicate the history of this case.

The murder for which the defendants were indicted took place in January of 1958. They were tried for this murder on the indictment found by the Grand Jury, and finally convicted on January 28, 1959. That is, approximately, over five and a half years ago, and thereafter was commenced a whole series of legal proceedings, appeals, maneuvers and the like, that I assume is the main purpose for this proceeding, so as to initiate another circle of proceedings that will delay the execution and judgment of this Court.

Only last June the United States Supreme Court, I think for the third time denied (34) certiorari to these two defendants who applied for review of the judgment of the Third Circuit Court of Appeals, which in effect affirmed all of the prior proceedings, and I would assume that if the State is successful in its motion this morning, or whatever the Court would decide, if it should decide adversely to the defendants that there will be another appeal to the Supreme Court, possibly another application to the United States Supreme Court for certiorari, then a renewal of the Federal ladder by way of habeas corpus again.

They seem to have no reluctance to re-warm the cold potatoes, and throw out the same arguments that have been decided adversely to them time and time again, only as I think for the purpose of delay.

I made this observation to other Courts, not because I criticize counsel's efforts for trying to litigate even on appeal questions in a case such as this. I recognize this is an important case to the defendants, but it is equally an im-

portant case to the State, (35) but I take the position that justice will best be served for everyone if there is a complete review as quickly as possible by an appellate tribunal, and if the State's highest Court is not the last word, then even to the highest Court of our land, the United States Supreme Court, and that after there has been a final determination then that should terminate the proceeding.

I think these type of cases which are allowed to drag on five years, six years, even eleven years after conviction only encourage a disrespect for the law by the general public, and I would hope to see in my lifetime some expression from a Court that will touch on this subject with a great deal more finality than has already been indicated. This has been said and alluded to by other Courts and other Judges, but I don't think that there has been a clear expression and at the same time I don't want to foreclose anyone of their opportunity to raise constitutional questions involving due process or personal liberty rights or even (36) fair play that would rise to the status of constitutional rights, but there ought to be somewhere along the line and into the proceedings, and this case, I think, is a good example of what I am talking about.

Now, in this petition, their first point is raised in paragraph two which now tries to refer to the most recent decision of the United States Supreme Court in the Malloy vs. Hogan case.

Now, I was quite interested in the colloquy between the Court and counsel for the defendants when this point was raised, and the Court asked counsel for an expression of his contention as to whether the Malloy case actually held that the Prosecutor may not in his summation comment upon the defendants' failure to take the stand, and I was quite

interested in hearing such an unequivocal answer in the affirmative by the attorney for the other side.

I read the Malloy case time and time again, and I will again refer to it during the (37) course of this argument, and still have been unable to find that even this question was even touched upon, let alone decided.

The Malloy case came to the United States Supreme Court after the partner was held in contempt because of his refusal to answer questions in a State inquiry concerning gambling and other crimes. He refused to answer, revoking his privilege against self-incrimination extending from the Fifth Amendment. The State Court judged him in contempt and committed him to prison until he was willing to answer. He applied for habeas corpus. That was denied in the State Courts. He went to the Federal Court, and thereby asserted that he had a right to refuse to answer stemming from the Fifth Amendment, and now for the first time the United States Supreme Court held that the Fifth Amendment was applicable to the States through the Fourteenth Amendment, and reversed the contempt proceeding for which Malloy was incarcerated. This didn't concern any trial or any rights of summation. This was never (38) touched on or raised in the Court. It was never raised in the facts and couldn't come into the facts because there wasn't that kind of argument, it wasn't that type of a case.

The United States Supreme Court has not as yet said—I don't disagree with the Malloy case, all I am saying is that the Supreme Court neither in Malloy or any other case has yet said that even though the Fifth Amendment would be applicable to the States, that this deprives comment by the Prosecutors or the Courts as to the inferences that the jury may draw from the failure of the defendants to take

the stand and deny any inculpatory evidence that the State produced against them.

Your Honor was quick enough to recognize that the Federal practice which prohibits comment by the prosecution and the Court stems from the statute, the Federal statute.

New Jersey also has a self-incriminating statute, or a statute, which, I should say, prohibits or affords the right of any person (39) not to give evidence which will be self-incriminating, but this statute has been construed by our Supreme Court time and time again as to not to prohibit the prosecution from commenting upon the failure of the defendants to take the stand.

This was touched on by our Supreme Court in the case of State vs. Corby decided in 1958, and has not been criticized or changed in any way by the Supreme Court or Appellate Division opinions which I have referred to in this opposition.

In Corby, our Supreme Court held that our rules which allows comment upon the defendants' failure to take the stand accords with common sense and justice, and while they recognize that the defendants cannot be compelled to testify, but they have the privilege of doing so, the Court held was for the benefit and protection of the innocent.

They went on further to explain the reason for it, that if the defendant remained silent when he should speak, he does so by his (40) own choice, and that choice of his should reasonably be subject to comment.

What they are really saying is that the defendant knows what might be said against him if he doesn't deny inculpatory evidence, and the Courts have recognized that common sense and logic would enable the jurors themselves without anything to ask themselves the question: Why hasn't the defendant taken the stand and denied what is going on?

And if the jurors could so ask the question and be logical and reasonable and apply the same kind of thinking process in that case as they would in their ordinary business affairs, come to the same conclusion, the Court would then recognize if they were unable to do so, there is no reason why the prosecution or the Court should not be able to explain to them how far they should apply this thinking process.

Even in the Federal Courts which follow the rule of no comment, by reason of the statute and the like, indicate that this privilege of against self-incrimination, like (41) any other privilege is one that can be waived.

Now, where the Courts have found that the defendants have waived their privilege, then they have no ground for complaint. So, that if that in a criminal case the defendant doesn't take the stand and the defendant's attorney should comment about his client's failure to testify, this would open up the door to the prosecution for the government to comment about it, and the Court then applied the waiver theory, and say that you have no right of complaint, because you opened the door, and the prosecution or the government has a right to respond, and even argue and negate the reasons advanced by the defendant's attorney. This has been an old practice, even though we cite cases that were decided in 1944 and 1948, and I can't help smiling, because my friend on the other side indicated these are old cases. I am inclined, maybe, to agree with him, but 20 years in the Federal System is not a long time for stare decisis with the changing world, changing events in Washington, it may very well be that (42) decisions of 20 years ago are not binding on the Courts today, but I respectfully submit, however, that until they are reversed they ought to have some persuasive weight behind them. So that as a general

rule—and I might say this without any equivocation at all, the privileges contained in the first Ten Amendments are rights that may be waived, and if they are waived, then there is no complaint about them.

Now, I would say then that Malloy hasn't gone that far, hasn't even touched on the question as to whether or not there should be any summation, and New Jersey says that you may comment about it, and even though we do have statutes, the question then would pose itself, and I am contending they did waive, but how did they waive?

Now, if your Honor please, attached to our memorandum, I produced photocopies of the transcript of the trial proceedings, at least that portion of it pertaining to the defendants' attorneys' argument.

Even though Godfrey is not involved (43) in these proceedings today, Godfrey was involved in the trial, and what might be applicable to Godfrey would make it appropriate for the prosecution to argue in his summation.

Godfrey's attorney said this, and I don't have to refresh your Honor's attention to know in this case the defendants not only did not take the stand themselves, but produced no evidence on behalf of the defense. When the State rested, the defense rested as well.

Godfrey's attorney argued ——

THE COURT: Referring to what page?

THE PROSECUTOR: I am referring to page 1728 of the original typewritten transcript. He said in his argument, that the Prosecutor said, ". . . that we might take that stand and might lie," meaning Godfrey might take the stand and might lie, then he continues, "but we haven't

Argument

We haven't taken the witness stand in this case, we haven't lied to you.

"I told you last week why we were here. We are in this courtroom, we have been in this courtroom for the last two weeks for one (44) reason, and one reason alone, and that is because the law of New Jersey in its wisdom saw fit that where a man is charged with murder, he shall be tried by a jury, and that is where his life is at stake the jury shall make the determination as to whether he should live or die, and that is why we didn't come before you and offer any false defense, we didn't tell you anything that wasn't true." And note in the following paragraph, "What could Wayne Godfrey? Could he deny that he was involved in this conspiracy to commit robbery? As the Prosecutor has described it, could he deny those facts? There is no doubt, no doubt that he was involved, he was connected with it. No, he doesn't deny that.

"Could he come into this courtroom and deny that Edward Davis lost his life? Could he tell you that Edward Davis didn't die as a result of gunshot wounds? He couldn't say that. I didn't even want to say it."

Continuing on to page 1729, "During the course of the trial I offered to admit that (45) Edward Davis died as a result of gunshot wounds. I offered to admit many things. Why? Because they are true. What could Wayne Godfrey say if he came into this courtroom, if he took this witness stand, all he could say he is sorry, and he didn't mean to do it. What good would that do him? Would that bring Edward Davis back to life? Would that restore the life of this man? It certainly wouldn't, it couldn't.

"And is there any doubt in anyone's mind that he is sorry? Look at the man, he sits there right now, his very life is at stake."

Argument

Now, Cassidy's lawyer argued, and I am referring now to page 1751 of the original transcript, "Great mention was made, and undoubtedly will be further made by the Prosecutor to the fact that the defendant failed to take the stand, and because he did not take the stand, the witness stand, we may all assume that he did not do so because he could not deny that which is charged."

Now, here is what his lawyer said: "That is an honest statement. The action of (46) the defendant was an honest act.

"He has not taken the stand to conjure up stories and lies.

"The facts are as they are presented.

"Was not the testimony or the statement made by Stanley Cassidy at the interrogation of Chief Dube presented?

"The questions were read to you and the answers were read to you."

Now, Johnson's lawyer says, and I am quoting from page 1774 of the transcript, "That is why, members of the jury, we are here today. So, let us have it clearly understood that by law it was utterly impossible for us to plead not guilty to the charges in this case.

"I also think that I can anticipate that the Prosecutor will have much to say to you in regard to the fact that the defendant did not take the stand. And I believe that the Prosecutor will charge you—rather have the Court charge you that the failure of the defendant to take the stand from that fact, that you may infer or believe that the defendant (47) could not successfully answer the evidence or charges against him.

"Now, members of the jury, I think the Prosecutor will dwell upon that I believe he has already earlier this afternoon.

Argument

"I told you members of the jury at the beginning of this case that I had made up my mind that we were not going to present any trick defense, that we were not going to try to fool you, and that we were going to ask the State to prove their case according to law, and I think that we have done that.

"I told you that the defendants were entitled to have the charges against them proven against them according to law."

Now, this is very significant: "And, members of the jury, the reason that Sylvester Johnson did not take the stand was because I don't believe and I know that he could not successfully deny these particular charges against him. His confession certainly implicates himself.

"Members of the jury, this case was (48) lost a year ago by the defendants. This case was lost when a citizen had the alertness of mind to take down a license number and report it to the police. This case was lost from that day on."

Now, with that in mind, let's now refer to what they say was the exacerbation by the Prosecutor. Your Honor will keep in mind I am referring to those facts where it was said in the summation that the defendants were sorry. Well, we never heard, or had the benefit of hearing the defendants say they were sorry. The jury was denied that privilege. All we had was their lawyers saying they were sorry.

They also all admitted they couldn't deny the allegations or the proof by the State. So, that the Prosecutor argues, "Ladies and Gentlemen, now I hear, and now I understand why they said nothing last Friday when they opened, why these attorneys didn't make any claim for the defendants. Now it is crystal clear. Now they finally admit it. What was there to deny? The State has proven a clear case. The

(49) defendants had confessed to it. We merely are here as observers. This is the situation and now they don't even take the opportunity to get on the stand. Who speaks for these defendants?" Who speaks for these defendants when they say they are sorry, and that is what I was alluding to. Are the defendants speaking for the defendants? Why shouldn't the defendants speak for themselves? How can the lawyers say that their clients are sorry if the client doesn't say "I am sorry." How do we know? And I am arguing to the jury that the lawyers are actually speaking for the clients when the lawyers say, "My client is sorry."

Continuing, "When someone says that he is sorry, why don't we have the opportunity to hear whether or not they are sorry? This they denied themselves. They denied it to you and to everyone else, the opportunity to hear from themselves. Wouldn't this have indicated some sorriness on their part? They wouldn't expose themselves on the stand. They didn't dare get on the stand. They would rather hide behind (50) some self-serving statements snatched out of context or otherwise in the confession. They didn't dare take the stand and bare their breasts and say we are sorry."

I think this is all fair comment, and I think it was opened up by the defendants in their summations, and is the type summation and type of ground that the Courts have indicated that where their attorneys raise this kind of a contention in their argument, that the prosecution has a right to respond in argument and negate those contentions or even those inferences or arguments.

THE COURT: I understand that you are arguing then that you did nothing more than answer the arguments which were made by the various counsel for the defendants?

Argument

THE PROSECUTOR: Exactly.

Finally I would say this, and I think this is very important, if your Honor please, at least at this level, I have argued that Malloy doesn't go that far as to say that the extension of the Fifth Amendment to the States (51) precludes argument or comment by the prosecution or the Court on what inferences may be drawn from the failure of the defendants to take the stand in those instances where the defendant does not testify.

But assuming, assuming, that this is the next step until the next case that will come before the Court, and assume that the Court will say, the United States Supreme Court will say, or any Court would say that the Fifth Amendment does apply to the States, then there may not be any comment even in the absence of a governing rule or statute, but the defendant's failure to testify, assuming that will be so, and we still have that decision yet to get, I ——

THE COURT: Even when the defendant's counsel comments as in this case.

THE PROSECUTOR: Right.

THE COURT: Do you think the United States Supreme Court would go so far as to say you can't even answer the arguments?

THE PROSECUTOR: I can't conceive of that, but assuming further that the Malloy case, (52) or the next case following Malloy will interdict comment about the defendants' failure to take the stand, I would say that Malloy or that case which will so hold should have no retroactive effect. It would only have prospective effect.

Argument

Now, in no case affecting law enforcement has much impact on a State such as New Jersey, at least, and other States, which does not follow the exclusionary rule concerning evidence seized unlawfully as Mapp. Even Mapp has been held by our Courts and by the Federal Courts, and by most of the jurisdictions, not all of the jurisdictions, not to have any retroactive effect. This was again referred to in Smith decided, as I indicated before, July 7, where our Supreme Court said, "Most Courts have held that Mapp does not thus apply retroactively." Then they cite a number of Federal decisions coming out of the various Circuit Courts, many of them certiorari denied by the United States Supreme Court, and the Smith opinion also refers to the various opinions in our own State as following this holding.

(53) THE COURT: I think that ruling is quite sound and rational, otherwise the Court would be opening up Pandora's box.

THE PROSECUTOR: If Malloy would have the effect argued by my friend on the other side as condemning the Prosecutor's summation upon the failure of the defendants to testify, and if this should be applied retroactively, we would open all of the State prisons now and review every case where there was such a situation. I just couldn't conceive of the calamitous effect of that decision.

I think these were the motivating philosophies behind the Court which refused to apply Mapp retroactively. Certainly, the holdings in Mapp were grounded on the same kind of constitutional rights that we are now applying to the Fifth.

The reason for it our Supreme Court decided in the James Smith case, which I think was decided a couple of

years ago, 1962, and the Court in the Edgar Smith case refers you back to the James Smith case for the reasons for it, (54) and they are well documented and grounded.

I think I have spent enough time on this point number two, but at the same time I do this because I recognize that there was some color of argument made in this point that required attention. I don't subscribe to any part of the petitioners' argument, but unless we analyze it a little more closely, we would be prone to shy away from it.

Now, let me address myself to the next point, which is contained in their paragraph three, and that is that during the interrogation they say they were at no time advised of their rights to counsel, trying to invoke the Escobedo case.

I followed the argument advanced by the petitioners, as well as the colloquy by the Court, and I think this is highly significant. I am not too sure my friend on the other side fully answered the Court's questions and interrogation, but it struck me—I am not criticizing him in the slightest, counsel on the other side as to how he should answer and the (55) like, it may very well be he had good reasons for answering the way he did, I trust he did, he is very capable, but I think it is important to read this allegation in the language that he did because there was a point made time and time again, these allegations were verified, and therefore they seemed to have acquired some additional stature by reason of this fact. They were verified by the defendants in a general affidavit. What do the defendants say? I am reading now paragraph three, "That, during their interrogation and the taking of their confessions, petitioners were at no time advised of their right to counsel, and were never given the opportunity to seek counsel, were held incommunicado from family and friends who might have assisted in obtaining counsel, and were thus effectively de-

nied the assistance of counsel during the most critical stage of the criminal proceedings against them."

Nowhere, and I take it this petition was carefully drawn, nowhere do they say that they sought the opportunity of obtaining counsel; (56) nowhere do they say that their family and friends tried to see them and were denied access to them, because they were held incommunicado by the State law enforcement officers; this is important, because we could admit that we didn't advise them of their right to counsel, and still not come within Escobedo. This kind of a proposition was raised in Smith too.

This is the language by our Supreme Court in the Edgar Smith case: "Defendant does not say he was denied a request to seek counsel at any point prior to his confession. Rather defendant appears to say that he in fact did not see a lawyer before he confessed, a circumstance which would not invoke Escobedo."

He doesn't say in this petition that he had a lawyer and a lawyer tried to see him or contact him and advise him, which would maybe bring him within Escobedo, but he doesn't go that far.

Now, whether or not he was held incommunicado is only one of the elements.

Now, today we hear they are able to (57) produce five witnesses to testify that they tried to contact Cassidy and they tried to see him, and they were denied the right to speak to him, and that Cassidy himself wanted an attorney. Why isn't there an affidavit to say this? They had the five witnesses, they gave us five names this morning in argument. There is nothing to preclude them from giving us an affidavit so we could see for ourselves. They produced three names of witnesses for Johnson, who they now contend made efforts to talk to Johnson. When? When did

they make efforts to talk to Johnson? Johnson was brought down from Newark in the early hours of the morning. A confession was taken from him right as soon as he arrived in Camden. Did they know that he was arrested in Newark and arraigned in Newark on the charge of murder?

THE COURT: Now look! I don't want any demonstrations from the spectators. You sit quietly. I don't want any more nodding. I don't want any more talking. You sit there quietly, or I am going to ask you to leave.

(58) Proceed, Prosecutor.

THE PROSECUTOR: I make this comment because I think that this is the kind of sham defense that comes in five years, six years after the whole situation developed, and they now try to concoct a story. This has been tried time and time again. We had a motion for a new trial. We had witnesses who perjured themselves, not to mention the fact that the defendants themselves committed perjury, and this was commented on, I think, by Judge Martino who heard the testimony and the motion for new trial, and I was quite amused by the affidavit attached to this petition for the defendant who is now sitting in the death house facing execution on a murder charge, and he says, "In making this affidavit I am aware that false swearing is a misdemeanor and that the punishment for false swearing is a fine of not more than $1,000 or imprisonment for not more than three years or both."

I suppose at this point he would like to be sentenced for three years for perjury or (59) false swearing if that would delay the final execution, and I hope that the Court will certainly forgive me if I raise a smile, because I don't want

anyone to think that I don't recognize the seriousness of this whole kind of proceeding in this kind of case, but I would ask the question, with a defendant in the death house under a warrant of execution, what effect does a false swearing statute or penalty mean to him?

But to get back to my principal argument, we have no proof and no allegation even that they had counsel and counsel were denied the right to see them, or that friends of any sort wanted to see them, and they were unable to see them because they were held incommunicado. This is the real weakness of the allegation.

To go one step further, if they were held incommunicado, if they were denied the assistance of counsel, if they were denied assistance of friends; what would that denial go to? It would go to the question of voluntariness of the confessions. It wouldn't go to (60) anything else but the voluntariness of the confessions, and that has been litigated and relitigated and re-relitigated time and time again, most recently, until the Third Circuit Court of Appeals when they reviewed all these proceedings and held that the confessions of Cassidy and Johnson were not involuntary, and affirmed the convictions.

I would now refer back to the Edgar Smith case and say that one of the underlying principles of this thing is not to raise questions that should be raised on direct review, unless they were of constitutional proportion, even if they are of an inferior constitutional proposition, once they are decided may not be relitigated.

So, the Third Circuit has finally, and with certiorari denied by the United States Supreme Court, reviewed all these contentions concerning the confessions and held that the confessions were not involuntary, affirmed the convic-

tions, and for that reason point three should be passed out the window.

(61) Point four applies to the question or attacks the proposition that we got a gun from him, and in addition that we took Cassidy into custody without a warrant. Well, what difference does it make how he was arrested at this point?

Suppose there was an illegal or unlawful arrest initially. What difference does it make now after the conviction? He could have applied for habeas corpus at the time to be released from the custody of the law enforcement officers, if there was an unlawful arrest. But now, five years after the conviction, what difference does it make how he was arrested, whether we had a warrant or didn't have a warrant? It might go to the question of evidence that might be seized, but there is no contention that we seized any evidence as a result of the unlawful arrest, which was used at the trial. So, therefore, I don't see what difference it would make, what the conditions were surrounding the arrest. They would have nothing to do at this point. We contend that we had probable (62) cause to arrest without a warrant.

THE COURT: Subsequent facts, do they not adequately show ——

THE PROSECUTOR: We proved murder against them.

THE COURT: Counsel in their summations certainly indicated there was probable cause. Under our law we have no strict rules of arrest. We follow what we believe to be the common law. Where there is probable cause a warrant is not necessary. To bash in the front door is proper

in order that an arrest may be properly effected. I think that has been the law from the common law days, and it hasn't changed down to today, to my knowledge.

THE PROSECUTOR: There is no proofs that the officers broke into Cassidy's house or busted into his house. I take exception to that kind of remark, to that kind of allegation in counsel's argument, not because I think it is important, but it has been my experience in this case, that extraneous matters have crept into it and almost become law, because they went (63) unchallenged. There is no proof in this case that they busted into his house, and I don't know why counsel should take the liberty of saying that the police officers broke into the house or busted into the house, when there is no such proof. I think this is an unjustified liberty.

THE COURT: Well, assume that his argument is correct. Would it make any constitutional difference?

THE PROSECUTOR: No. It doesn't make any difference statutorily, casewise or constitutionalwise as your Honor has indicated.

THE COURT: I can only deal with constitutional questions at this point.

THE PROSECUTOR: That's right. I don't want to walk out of this courtroom, and I have noted that the press are present, to let a statement like that go unchallenged. Offhand, I don't know what the facts are, whether they knocked on the door or what, but until I am proven these facts, unless there is some allegation here, I don't

think counsel has the (64) right to charge that police busted into the house, and at the same time I want to be quick to say, if they did bust into the house in pursuit of a suspect, real suspect, in a first degree murder case who is later proved and later admitted and confessed to his guilt, that the police should be commended.

THE COURT: I know of no law in this State that is so foolish to say that a defendant has to invite police officers to arrest him.

THE PROSECUTOR: That's right.

The delay in arraignment was raised, argued and decided by the Third Circuit. It was decided adversely to the petitioners. Certiorari was denied by the United States Supreme Court, and again I argued before the Third Circuit, argued in the brief and argued orally, that the delay in arraignment only goes to the question of confession, the voluntariness of the confession.

The United States Supreme Court in the McNabb case held that the delay in arraignment did not vitiate the proceedings. The United States Supreme Court did not hold (65) that McNabb arose to constitutional proportion. They merely said, and have only said that they applied because of their supervisory power over the Federal police officers.

The New Jersey Supreme Court has recognized that the McNabb and the Mallory case do not rise to constitutional proportion, and merely stem from the supervisory powers of the United States Supreme Court over the Federal police officers and have refused to apply McNabb and Mallory in New Jersey. This was argued in the Third Circuit by the prosecution, by the State, and we cited LaPierre which at that time was the most recent case by the New Jersey Su-

preme Court, and now I would refer your Honor to a most recent case, this I didn't even cite in my own brief, it just came out, the case of State against Jackson and Ravenell decided July 31, 1964, in an opinion by a unanimous Court, Justice Jacobs speaking for the entire Court, and this is what Justice Jacobs says for our Court as late as July 31, 1964: "The defendant urges that notwithstanding any (66) factual showing of voluntariness, a confession should be excluded when obtained from a defendant illegally detained in that he has been arrested but has not been taken without unnecessary delay before a magistrate as directed by R. R. 3:2-3 (a)." Incidentally, erroneously cited in this petition, I am sure it was just a typographical error, it says 3:3-2. It should be 3:2-3. The Court again referred to the Pierce case, as well as the LaPierre case, and referring to LaPierre, Justice Jacobs said, ". . . which took cognizance of the fact that, in the exercise of its supervisory powers over the administration of criminal justice in the Federal Courts, the Supreme Court had reached an opposite result" and referring, of course, to McNabb and Mallory.

He goes on further to say, "In LaPierre, the defendant's request that New Jersey abandon its stand in favor of McNabb-Mallory was expressly rejected. That case was decided only last year and, and there being no defense of Supreme Court ruling that McNabb-Mallory has attained constitutional dimensions, (67) LaPierre will not now be departed from."

As of July 31, 1964, New Jersey recognizing the reasons for McNabb and Mallory cases still kept to the same line of decisions that they did with LaPierre.

So, I say for that reason that the lawfulness or unlawfulness of the arrest is not a question at this point.

Assuming that it was an unlawful arrest, which we do

not concede at all, because we say there was probable cause, and which makes it a lawful arrest as your Honor stated, because undue delay in violation of our rules has not been held by our Courts to invalidate the confessions, because the Third Circuit Court of Appeals has to review this situation and specifically pass upon the question. Application and certiorari were denied by the United States Supreme Court. The question has been litigated, died and should be put to rest, and following the principle as I first alluded to in the Edgar Smith case, it should not now be relitigated.

(68) The next point is raised in their paragraph five which deals with the question that Cassidy was induced to turn over a gun. This too was raised by the petitioners in their appeal to the Third Circuit, and the Circuit Court of Appeals likewise dealt with the situation, decided it, and didn't find any reason to reverse the conviction, and therefore they put it to rest, and we think that is where it should be and should not now be relitigated again.

THE COURT: I have read that record and I think the Third Circuit Court was correct, and I think what the Prosecutor told the defendants at the time the gun was found was certainly proper and didn't deprive him of any rights, and was the law of the State. It was even Federal law at the time.

THE PROSECUTOR: That's right.

Now, the next point in paragraph six raises a question that since Godfrey's conviction was reversed, not because the confession was coerced, but because the (69) confession was held to be involuntary, and I think there is nothing more than semantics here. They now say that because Godfrey's confession was used at the trial, therefore—and

this was held by the Third Circuit Court of Appeals to be a bad confession, therefore we should now reverse.

THE COURT: Does the record disclose that the Court gave to the jury the usual caution?

THE PROSECUTOR: Yes, repeated caution, that the confession only applied to the confessor, and does not apply or should not be used against any other defendant. The typical warning time and time again before the confession was read, afterward and the like. The record was replete with those admonishments and instructions and charges. But this situation was likewise raised in the Third Circuit, likewise raised in their petition for certiorari to the United States Supreme Court. They raised this very question seeking reversal of Cassidy and Johnson because the Third Circuit had reversed as to Godfrey, (70) and therefore they raised this very question which should likewise be reversal, and criticized the Third Circuit for not reversing as to Cassidy and Johnson because of Godfrey's confession.

THE COURT: Did the Court likewise tell the Court that they may find that Godfrey's confession was involuntary?

THE PROSECUTOR: In this case, we had the voir dire of the confessions out of the presence of the jury preliminarily, and the Court made the preliminary finding as to its admissibility. The State then proceeded to prove the confessions and voluntariness of them before the jury. This was an unusual situation where the defendants did not want this testimony heard by the jury, and therefore they agreed, and they stipulated with the Court and with the State, that if the Court should find preliminarily that the

confessions were admissible and voluntary, that they should be read to the jury without any proof as to the voluntariness.

THE COURT: Did the Court charge the (71) jury at the conclusion of the case that it was up to them to determine whether or not Godfrey's statement was voluntary?

THE PROSECUTOR: I don't recall at this time, because there was no proof from which the jury could find it was involuntary. They heard none.

THE COURT: I don't want to assume what Judge Martino said, but knowing him, I would be somewhat surprised if he didn't. I think it would certainly nail down the question that Godfrey's confession or alleged confession was, but the Third Circuit now says was involuntary was passed upon by the jury, and they weighed it separately and apart from the other two confessions.

THE PROSECUTOR: Well, the point that I am really making at this time is that this question was raised on the petition for reargument to the Third Circuit, raised again in the petition to the United States Supreme Court, and we raised the very question, so it was litigated, raised, litigated, decided adversely (72) to the defendants, and should be laid to rest and should not be relitigated to get in this petition following the ground rules of the Edgar Smith case, and I would further point out that this case is quite distinguishable from Ashcraft, which is relied on by the other side. In this case, all of the defendants confessed. Each of their confessions was given to the jury. This is not a case where you have two joint defendants as in Ashcraft

only one of the defendants confessed. This confession was given to the jury. When this confession was finally thrown out, the Court probably was right in saying because of this impact, how could you now hold the other defendant who had not confessed. This is a very important distinguishable fact which does not apply here.

Now, I would refer your Honor to the case that we referred to the United States Supreme Court, Malinkey vs. New York, or a similar situation as we have. They raised that same kind of question, and the United States Supreme Court has this to say, "The furthest (73) we have gone in a comparable cause from the State Court is to vacate judgment against the co-defendant who did not confess, and remand the case to the State Court for further consideration." Referring to Ashcraft, that is what they did. Here we have confessing defendants. Ashcraft doesn't apply. The United States Supreme Court held it didn't apply, but over and above, or together with the fact that the question was raised, litigated and decided by the Court and should be laid to rest.

In paragraph seven there is a statement of fact, and I sent for my ——

THE COURT: Prosecutor, I don't think you are going to finish soon, and I want to give Mr. Haeberle opportunity to answer you. Should we not now recess for a brief period for lunch?

THE PROSECUTOR: All right.

(Luncheon recess.)

Argument

(Afternoon session.)

THE PROSECUTOR: I believe before the (74) luncheon recess, if your Honor please, I had completed my argument concerning the points contained in paragraph eight, and I finally left with the point in paragraph nine, and this point the petitioners seek to criticize or challenge the Prosecutor's summation which dealt with capital punishment. This was raised for the first time, and I don't recognize any constitutional question here at all. The Prosecutor's summation was gone over with a fine tooth comb by our own Supreme Court on initial appeal, and it was finally approved in the initial opinion as indicated by our Supreme Court.

The case cited by petitioners, Fay vs. Noia, to my mind has no application. That is a Federal habeas corpus case, and I don't see that it makes any point here.

Mr. Batoff calls my attention to a possible misunderstanding that I may have left with the Court concerning the Third Circuit's decision involving the gun. The issue was raised and discussed by the Third Circuit, as (75) will appear in their opinion, and they have this finally to say about it. I am reading from their opinion. "Cassidy did not assign as a basis for his motion for a new trial or as a ground for Federal habeas corpus that his admissions concerning his gun had been induced by a promise not to use this evidence against him. Thus, no ruling in this regard is presented for appellate review. In thus disposing of the matter, we do not hold or imply that a finding of such inducement would entitle the prisoner to relief on constitutional grounds."

The point that I was making and want to leave with the Court is that the matter was raised, argued before the Third Circuit, and to the extent they found there was no constitutional infirmity, the matter has been decided.

Argument

I think this concludes all that we have raised and answered the petition. The other points and authorities are cited in the memorandum that we have filed with the Court.

So far as their prayers are concerned, these questions have likewise been disposed of (76) by our Supreme Courts in previous matters. We don't have any discovery devices as they now ask for.

THE COURT: Don't you agree that the rules are broad enough to permit it?

THE PROSECUTOR: The rules are broad enough to obtain whatever information they need for the purpose of trial by way of a bill of particulars and the like.

THE COURT: Even broader than that if the ends of justice might require it. I am sure your recollection will agree with mine, that procedure was patently not broad enough, and the Court thought it should be broader, and the rules gave the Court that right.

THE PROSECUTOR: That's right. Certainly they were never denied due process to find out what the factual situation actually is.

For the reasons that I argued, and as well as those that we have contained in our memorandum, I submit that the petition for post conviction relief should be dismissed, and that (77) their prayers for a stay be denied.

THE COURT: Mr. Haeberle, before you speak, I would like to pose this question to both you and the Prosecutor.

Do you not agree that now that this Court is limited to

the consideration of strictly constitutional questions which have not previously been disposed of by either our Supreme Court or the Federal Court, with the possible exception of those constitutional rights which may not have been previously available, isn't that all that I can deal with, because are not all those decisions of the Supreme Court in this case and the Federal Court in this case binding upon me, and am I not limited now to the consideration only of constitutional issues not previously raised, providing they were available to be raised at the time of those decisions?

MR. HAEBERLE: My answer will be different than the Prosecutor's, and my answer is no, I don't believe you are so bound.

THE COURT: You mean I am not bound by the opinions of our Supreme Court or the (78) decisions of the Federal Court in this case?

MR. HAEBERLE: I believe, your Honor, in Fay vs. Noia, the question is whether or not on the basis of the facts presented to the Court what the proper decision should be. The failure of counsel to make objections, or the failures of counsel in the past are not to interpose, or not pursue certain avenues, doesn't preclude this Court from deciding the issues raised now on the merits, and I further suggest that on the basis of Fay vs. Noia, the petitioners are now asking—this is the first time it has been asked for, is a hearing, full and complete hearing respecting the background that went into the taking of these confessions. That was one of the problems in dealing with the matter at the Circuit Court, the falsity of evidence dealing with this particular point. The coerced confessions and

background dealing with them, I think, specifically as to that, the petitioners now have a right to request this hearing. You are not bound by these prior items.

THE COURT: In reviewing the decisions (79) of the Supreme Court and in reviewing the decisions of the Federal Court you don't think I am bound?

MR. HAEBERLE: The Supreme Court said time and time again denial of certiorari neither is an affirmance or disaffirmance or disagreement with the record below. It doesn't stand as approval or disapproval. It merely means that the United States Supreme Court either sees no reason or no substantial Federal question.

It might be pointed out that the last denial of certiorari, Mr. Justice Jackson dissented, and again that doesn't mean there might not be others who would dissent. The denial of certiorari by the United States Supreme Court by many statements of the Justices themselves is no indication of propriety of the actions taken below. Some of these issues raised in the Third Circuit opinion, for instance in regard to Cassidy, Justice Hastie said, "Thus no ruling in this regard is presented for appellate review. In thus disposing of the matter, we do not hold or imply that a finding (80) of such inducement would entitle the prisoner to relief on constitutional grounds." Justice Hastie said it wasn't properly presented, it wasn't persented to the State Court and wasn't presented to the lower District Court. A number of other items are the same way. They have never been presented to the State Court. The argument on using the coerced confession of Godfrey in obtaining confessions from Cassidy and Johnson, that argument wouldn't be made until the Third Circuit held that Godfrey's confession was coerced.

Argument

THE COURT: Don't you think that the most recent State of New Jersey vs. Edgar Smith is absolutely binding upon me?

MR. HAEBERLE: Well, I certainly say that the decisions of the Supreme Court are binding on you, but I would hesitate to interpret State vs. Smith as precluding this Court from following the mandates of the United States Supreme Court in Fay vs. Noia. I think that case is very much in point. Fay vs. Noia involves, I believe, Charlie Noia, one of three (81) defendants tried in the State Court, and some twelve years went by and Noia didn't appeal. He was convicted on trial and didn't appeal. His two co-defendants, one was name Bonino, and the other gentleman's name I don't remember, but they did appeal, and time for direct appeal by Noia had expired. Now, the other two men had gotten new trials. Noia comes in, comes to the State Court on a habeas corpus, goes up, it goes to the Federal Circuit, the Second Circuit, I believe, and they said they should grant a new trial to Noia. The State appealed, that is Fay, I believe he is the head of the prison, and the U. S. Supreme Court said no, you can't have a waiver, it has got to be an intentional right. He didn't waive anything, he hadn't abandoned anything. The point of the case, as I understand it, is that if the facts are presented, or the failure to make objections during a trial is not important, the fact is that it should be decided on the merits, and if justice requires, if there is something wrong with what happened there must be a decision on (82) the merits, and the fact that it may have been litigated somewhere else or not litigated, or he failed to preserve it by timely objections in the normal course, or he failed to make a direct appeal, it is my understanding of Fay vs. Noia that has no relevance

to the point of doing justice on the merits. That is why I say my answer, I think, would be different from the Prosecutor's. I don't think that State vs. Smith if properly interpreted can be contra to Fay vs. Noia.

THE COURT: How about the rule of Court on post conviction remedies, doesn't that limit what I can do here?

MR. HAEBERLE: Well, as I understand the new rule on post conviction remedies, the introduction says, it includes all rights formerly available and other means, and not in contravention of the constitution of New Jersey, which I suppose the last part has to do with the right of habeas corpus. I think, again, that these are matters that properly can be presented to the Court for its consideration. (83) The question is not whether these things should have been raised by some objection, whether they should have been raised on appeal, the question is whether or not what was done was fair and just. To argue or to take the other points, I think is to step further backward into the recesses of the law. I think the U. S. Supreme Court has taken a different approach and made it of constitutional dimension, and I am sure the Prosecutor will probably take the opposing side. Of course, he can speak for himself.

THE PROSECUTOR: I think the answer to the Court's question is contained not only in Rule 3:10 (a)-2 which outlines the grounds that are cognizable in a petition for post conviction relief, such as substantial denial of the defendants' rights under the Federal or State constitution, lack of jurisdiction in the Court, illegal sentence, or any ground previously available by way of habeas corpus.

I think it is further answered in the comment by the

Argument

Court in laying down the rules I referred to initially in my argument, in the (84) Smith case, which is that all alleged errors that don't rise to constitutional status must be asserted in a direct review, which is appeal, with the exception of those errors which denies fundamental fairness in a constitutional sense. The Court went even so far as to say so far as they are concerned we won't hear them again in a post conviction proceeding if they were previously raised and disposed of in a previous Court. I think your Honor is bound by the decision of the Supreme Court and the Third Circuit. I don't think there is any alternative, otherwise you would be reviewing them.

MR. HAEBERLE: To go forward on that point, particularly in reference to State vs. Smith, I think the thinking of the Court is expressed in part of the quotation which the Prosecutor has included in his brief, part of which is "... the sole exception being an error which denies fundamental fairness in a constitutional sense and hence denies due process of law."

I would suggest to the Court what is (85) being raised here are constitutional questions denying fundamental fairness and raising questions of due process of law. We have the denial of counsel, which is a constitutional question. Under Gideon vs. Wainwright, you have self-incrimination. Under Malloy, you have the right not to have a coerced confession. These are all constitutional rights. Therefore, I think the Court should have to decide that on the merits.

The Prosecutor in reference to paragraph two of the complaint made reference in support of his argument, and point two deals with the impropriety of the Prosecutor's summation, and also the Court's charge.

The Prosecutor bases part of the right to make the sum-

mation on the fact that Godfrey's counsel made statements which called for the response, in the Prosecutor's thinking, for the type response that he made. I think that is very significant. You will note there are two or three pages there, remarks of Godfrey's counsel. What ought to be very important is the (86) fact that this is the counsel for the man whose confession was coerced.

Now, the confession was coerced, and the Prosecutor should not be allowed to take advantage of some action done in behalf of a man whose confession was coerced by the State, and that is exactly what is being done. The Prosecutor is basing, at least, substantially in part the right to make in his summation comment about failing to take the stand based on Godfrey's counsel's summation. Since Godfrey's confession was coerced, I think, again, that is another reason why there must be a new trial for Johnson and Cassidy.

THE COURT: Mr. Haeberle, there is no contention that the defendants' counsel said anything improper to the jury in their summations, is there?

MR. HAEBERLE: No, but the point is ——

THE COURT: What you are telling me is that the Prosecutor doesn't have the right to directly meet the arguments of defense counsel at the time of their summation. Now, (87) if he can't meet those arguments, what is the purpose for him even getting up to address the jury, except to say Ladies and Gentlemen, you have heard the facts of the witnesses, you have seen the exhibits, you can take them to the jury room with you when the Court asks you to consider them, and we ask for a verdict of guilty of murder

in the first degree, and sit down. Do you mean to say he can't answer the arguments of defense counsel regardless of what issues they raise, and regardless of how ridiculous they may be?

MR. HAEBERLE: The Prosecutor has the right to sum up.

THE COURT: Doesn't he have to answer the arguments of his opponents? We are talking about matters which the Prosecutor himself raised. We are not talking about comments that the Prosecutor made without some facts in evidence or arguments before the jury. We are talking solely about what the Prosecutor did in a direct answer, using exactly the same terminology that defense counsel used, and you (88) say that is improper, which is tantamount to saying, "Prosecutor, you can't answer the man regardless of what he may have told you."

THE PROSECUTOR: May I also point out, I think it is very important in this case, the defendants through their attorneys admitted their guilt. The thrust of the defense was mercy. This is all they attempted to seek.

THE COURT: I think it is very obvious from the record.

THE PROSECUTOR: How can they contend they were hurt when they admitted they were guilty. In their arguments, all they said was don't give us the chair. How can they holler they were hurt?

THE COURT: I don't see how we could have due and proper administration of justice unless we are going to be

fair both ways. I mean, justice is a two way street. The defendants have constitutional rights, and the people of the State through the Prosecutor likewise have constitutional rights. The Court's duty is to make sure that all rights are (89) kept in proper perspective, so that justice will be duly and properly administered in accordance with the constitution.

These were set up in the constitutional provisions. They certainly were never set up so that criminals could be freed on technicalities, but merely so that we could seek the truth, to find out whether or not the defendants committed crimes or didn't. They were set up so that they could have a fair trial and fair evaluation of the facts by a jury, so the jury could bring in an honest true verdict.

MR. HAEBERLE: I think that is quite correct, with particular emphasis on the last, a fair verdict, that it would go to the jury without prejudice and passion.

THE COURT: A fair verdict implies fairness not only to the defendant, but fairness to the rest of the people in the State.

MR. HAEBERLE: That is, I guess, part of the process of justice.

THE COURT: No doubt about it. The constitution wasn't set up to benefit every (90) criminal. It was set up for the benefit of the whole society.

MR. HAEBERLE: I submit, your Honor, that the Prosecutor, even granting proper argument, even to that, he has no right to comment on the silence of the defendants. He

went way beyond that. He kept hitting away on the fact they didn't dare to talk, that they wouldn't bare their breasts, they wouldn't say they were sorry. I think that is going to the fundamental fairness of this trial, and fundamental fairness of the jurors' minds in trying to provoke prejudice.

THE COURT: The question is whether that is reasonable comment under the circumstances as they existed in this case at that particular time. That is what the Court has to decide. I don't think I can decide it now. I think it has been decided.

MR. HAEBERLE: The Prosecutor also argued for no retroactive effect for Malloy. He based his argument on the fact that Mapp hasn't been held by many Courts to be retroactive. (91) I would point out in regard to retroactivity, in Gideon vs. Wainwright there is some doubt as to retroactivity. The Third Circuit in April of this year Judge Hastie in Craig vs. Meyers and Gideon vs. Wainwright said there is retroactivity. In June the United States Supreme Court denied certiorari. The State appealed, and I do not mean to indicate by that, that since the Supreme Court denied certiorari that that is now the U. S. Supreme Court decision, but I would point out about four months before there was a memorandum decision of the U. S. Supreme Court, a two-line decision, the name and citation I can't remember, but I will be glad to look it up for the Court, in which the U. S. Supreme Court gave a reversal in light of Gideon vs. Wainwright to a conviction which arose in 1957. So, I think, at least, in the Third Circuit under Judge Hastie's opinion in Craig vs. Meyers and Gideon vs. Wainwright is absolutely retroactive.

Argument

One point we are talking about here is Escobedo vs. Illinois dealing with a right of (92) a defendant to have counsel at the pretrial stage, and I submit that if the right to have counsel assigned is of a constitutional nature it is retroactive. I submit that Escobedo in defining what the duties are of counsel is likewise retroactive, and these defendants should have had counsel.

Now, in response to the Court's question previously in line with the Prosecutor's comments, I don't understand Escobedo to require that a defendant must ask for counsel. As a matter of fact, I think a simple denial of it would bring them within the findings of Escobedo. Once the Prosecutor's attention or law enforcement's attention has centered on a certain defendant, I don't think that they have to request it, because, again, that would be saying that the person who has intelligence or a prior conviction or prior arrest knows he has a right to counsel can get one, but some young inexperienced boob like Stanley Cassidy couldn't, because he doesn't know enough to ask for it.

(93) My impression was, and I would be glad to submit to the Court affidavits from both Cassidy and Johnson on this point. I didn't feel it was necessary, because I felt Escobedo simply required a showing. A focus had come upon these two defendants and therefore at that point they were entitled to counsel. However, I will be glad to take advantage of the Prosecutor's offer to supply affidavits from the people who I mentioned but did not call, and also from Johnson and Cassidy.

THE COURT: Mr. Haeberle, I don't disagree with your theory, but there are circumstances which counsel may have, in fact, been denied a defendant, even though he specifically didn't say in plain English I want a lawyer. It

depends on the circumstances, and all the circumstances that I can gather in the case and they are already in the record in this case whether or not these defendants wanted counsel, and whether they were refused that right. There seems to be nothing in the record which would indicate that they wanted any counsel, (94) or that they were denied that right. The record seems clearly to point out they wanted to unburden themselves with this problem and tell the truth, and do it promptly, and they persisted right on down to the closing arguments of their counsel.

Now, surely there are cases where police officers might take advantage of ill-informed defendants, and by their actions in effect deprive a man of his constitutional right to counsel. The mere fact that law enforcement officers neglected to say to a defendant, look before we talk to you, you have a right to have a lawyer and don't say anything until you get a lawyer. If they took a statement without that, the statement is no good. That is not what the Court intended at all. At least, that is not my interpretation from a reading of the case.

MR. HAEBERLE: Well, I am sure that there are many factors that go into it. The State did not advise the defendants of their right to counsel. They had a right to remain (95) silent. They had a right to talk to counsel. The so-called explanation of their rights by Chief Dube to these defendants clearly omits reference to their right to have counsel, and their right to remain silent. Now, that is in the record in this case.

THE PROSECUTOR: I might bring your Honor's attention to the case of State against Scanlan which was decided in the Appellate Division July 6, 1964. This very point

again was touched on, and I think it was Judge Collester speaking for the Appellate Division said, "The defendant was not advised of his right to remain silent or warned that any statements he made may be used against him. Our Courts have uniformly held such cautionary instructions are not an essential, except in the statement of the facts that an admission of guilt is voluntary," citing the Pierce case, Cooper case.

THE COURT: Let's go to the question of voluntariness. We had in a recent murder trial, which we had to make that decision, which (96) reviewed all those decisions. It goes to the question whether or not under those circumstances it was voluntary. The Courts have said in that line of decisions time and again it is the better practice, definitely, for police officers to give full warning, because it removes the question, or further removes the question whether it is voluntary or not, but it is not an absolute essential.

MR. HAEBERLE: If your Honor please, the petitioners would be happy to supply affidavits supplying whatever facts of the matter may be respecting whether they requested, or who they talked to, or what was said, and what they did and their attempt to get counsel. I would likewise offer to submit to the Court affidavits from the named individuals that I read in the beginning and were here in Court. I would be happy to supply affidavits from them specifying the efforts that they made, who they talked to, what the date and times were. I was under the impression that the proper way to handle it was to ask for a complete hearing to (97) allow oral testimony to go in, to bring in other witnesses and allow the Court to evaluate all the testimony, rather than do it by affidavit, but I will be very happy to submit these affidavits.

Argument

THE COURT: Anything further?

MR. HAEBERLE: Well, there are one or two items, your Honor, with reference to point four, talking about the breaking into the house. It is a question of whether they had probable cause. In support of the fact that the policemen had probable cause, the Prosecutor argues the fact that an indictment was brought and trial was had and conviction obtained. I suggest that the probable cause is determined as of the time of the breaking and entering and arrest, and there is nothing in the record at the present time to indicate what the knowledge was at the time of that breaking and entering. I suggest, therefore, that is one of the reasons why the petitioner Cassidy is asking for this hearing to develop these facts.

Point five, we have already pointed (98) out that the question about the gun was not decided in the Third Circuit. It hadn't been properly raised.

THE COURT: Are you familiar with the holding of our Supreme Court in the recent Smith case, which is on page four, point one of the opinion, he said among other things, "Moreover the legality of the arrest as such has no bearing upon the validity of the conviction." Don't you think that is binding on me?

MR. HAEBERLE: I am not certain it is applicable in this case.

THE COURT: Well, if it is binding on me, I should not hold a hearing to find out facts which I am not permitted to explore, because our Courts have said it doesn't make any difference. Now, I think we must let it stand that way.

Argument

Any further arguments, gentlemen?

THE PROSECUTOR: I have nothing further.

THE COURT: Gentlemen, I want to say (99) it is this Court's opinion that we are limited here to the consideration, this being a post conviction proceeding, in the manner set forth by the Supreme Court in the case of State vs. Edgar Smith. I do not think that this Court can modify or enlarge that opinion in any way. That is the sole function of our Supreme Court. So there is no misunderstanding, this Court thoroughly agrees with the rationale and law expressed in that opinion.

Now, the Court said there at the top of page four, "Before dealing with the individual points, we should note two principles, one or the other of which disposes of most of the questions raised. One principle is that a post conviction proceeding may not be used as a substitute for an appeal from the judgment of conviction. All alleged errors inhering in a trial must be asserted in a direct review from the conviction, the sole exception being an error which denies fundamental fairness in a constitutional sense and hence denies due process of law. The second principle is that (100) an issue, even of such constitutional dimensions, once decided may not be relitigated." Now, the soundness of that holding, I think, is very apparent. The administration of justice would be a hodgepodge of uncertainty if that were not the law.

I will endeavor to deal with the points raised by the defendants in the order which they were raised, keeping in mind the Smith case.

Going to page twelve of your petition for post conviction relief, point (A), I do not believe that any constitutional

question of the type that I can consider has been raised here, nor do I believe that a situation has been brought to the attention of the Court which requires other testimony or further proofs on this point.

Point (B) with respect to the contention that this defendant was deprived of his right to counsel, I do not believe that the decisions of our Federal Courts or our State Courts, which are binding upon this Court, goes so far as to say that constitutional rights have (101) been violated under the circumstances which have been outlined by the defendants.

Point (C), the Cassidy confession now being inadmissible because of a decision of the Third Circuit Court of Appeals, and thus the Court should not consider the confessions of the other two defendants, and the Court having considered them at the trial violated the constitutional rights of the defendants Cassidy and Johnson does not raise a constitutional question, and does not, I think, even raise a legal question in the simple sense under our practice under our decisions.

Point (D), "The contention in paragraph five, claiming violation of Cassidy's rights through the use of the gun fraudulently obtained from him, has not previously been raised."

If you look at page 13 (A) of the appendix in the case of State of New Jersey vs. Wayne Godfrey, United States Supreme Court, October term, 1963, this appears, "I remember when I made my first confession I told Chief Dube that I didn't have the gun and the Prosecutor (102) came and got me and asked me did I have a gun at home at all. I said no at first because the gun did not belong to me. He said, 'Well, look, if you have a gun at home, all we want to do is check it, (to) see if it has been fired'. He said, 'We

won't use this as evidence against you if it hasn't been fired,' " which is certainly tantamount to telling the man if it has been fired we will use it in evidence against you. Now, that certainly doesn't deprive him of his rights. It is language that any child could understand. I fail to see how any constitutional right has been violated by the Prosecutor using the language as simple and as correct as that. If it has been fired, we will use it. If it hasn't been fired we won't use it. If it has been fired the Prosecutor might use it. I see no substance at all in that argument.

Point (E), again the confession of Godfrey being inadmissible, and they contend in effect that the confessions of the other two defendants were obtained by an inadmissible (103) confession and therefore should not be used improperly, used in violating his constitutional rights. The contention is not that Godfrey's confession was false, it is not that the Prosecutor used a false confession in obtaining the confessions of the other two defendants, but merely that he used a confession which was inadmissible at the time of trial, because it was not voluntarily given.

How can two defendants be tricked when the Prosecutor uses an inadmissible statement which is in fact true, and which the defendants' attorney admitted to the jury was true, because he couldn't deny it. I don't see how any constitutional rights were deprived or withheld from the defendants by use of this confession.

Point (F) refers back to paragraph eight on page six which you say, "The petitioners were unlawfully detained and interrogated by the police authorities in violation of New Jersey Revised Rule 2:3-3." In the first place, I find nothing from your argument, nothing from (104) the record which indicates that the rule was violated, but assuming your factual contention is correct, violation of our rule

does not raise to the height of a constitutional question. Therefore, this Court cannot now pass upon it.

Point (G), in which you contend that the Prosecutor's summation violated the defendants' constitutional rights. I have read the pertinent parts, not only of the Prosecutor's summation, but also defense counsel's summations, and I find nothing in the Prosecutor's summation which is not a direct answer to the questions raised by defense counsel. Whether the Prosecutor's remarks were proper or not depends on the circumstances which existed at the time they were made as to whether or not they were fair and proper comment. The Prosecutor's remarks might well have been highly improper under different circumstances, but the Prosecutor was answering directly the arguments of defense counsel which certainly he has a right to do in the discherge of his public duty. Therefore, I believe that no constitutional (105) question is presented here. There is no constitutional question raised here upon which I can act.

I think that disposes of all the points you raised with the exception of your request to take testimony and your request to propound interrogatories.

I want to say once again, that the apparent expressed opinion of defense counsel, that our rules do not apply adequate safeguards to defendants is not so. We have a very simple philosophy under our Court rules. First that we seek the truth. The rights of all litigants will be protected, that justice will be speedily and duly administered.

Now, I make the observation that those rules in the main are patterned after the Federal rules which likewise seek to do the same thing. The rules adequately contain provisions that if in the opinion of the Judge the rules do not accomplish the clear expressed purpose that justice shall

so be administered, that the Judge can expand the rules to the end (106) that justice will be done. From our practice I can assure you that throughout our State that is done every day with interrogatories properly presented at the proper time at a trial, with a clear showing to the trial Judge that the information could not properly be gained in any other manner, the information is essential to the proper defense of a defendant would certainly be authorized by the Court. These interrogatories are not proper now for the reasons which I have previously expressed, and the various points which you have raised, for the same reason, the Court will not now permit any further hearing because of constitutional grounds that were presented which would warrant this Court taking further testimony.

For the reasons which I have expressed, the application of the defendants in all respects is denied, including the application for a stay for the warrant of execution entered July 31, 1964.

MR. HAEBERLE: Your Honor, may I have the Court's permission to have the interrogatories (107) put on the record?

THE COURT: Yes, I think they should be spread upon the record.

Anything further, gentlemen?

MR. HAEBERLE: No, your Honor.

THE PROSECUTOR: That's all, your Honor.

THE COURT: Court adjourned.

(Court adjourned 3:45 P. M.)

Interrogatories

INTERROGATORIES.

To: Howard Yeager, c/o Norman Heine, Esquire, Counsel for Respondent, Camden County Court House.

You are hereby directed to make answer to the following Interrogatories:

1. Furnish the names, present addresses, (108) occupation at the time of the events and present occupation of all law enforcement or investigative officials of this or any other jurisdiction, and representatives of the District Attorney's office, including but not limited to all attorneys, detectives, policemen and investigators, who participated in the arrest of:

a. Sylvester Johnson
b. Stanley Cassidy
c. Wayne Godfrey

and those who participated in the interrogation of:

d. Sylvester Johnson
e. Stanley Cassidy
f. Wayne Godfrey.

2. Were there any warrants issued for the arrest of Sylvester Johnson, Stanley Cassidy and Wayne Godfrey, or any warrants for the search of any premises relevant to this case? If so, attach copies of the warrants and affidavits.

3. Supply a separate narrative chronological statement of all events relating to Sylvester Johnson, Stanley Cassidy and Wayne Godfrey from the time of the arrest of each of them until each of their preliminary (109) hearings.

Q. Who was present at the time with you?

A. Detective Golden Sunket, Lieutenant Conly, Sergeant Tracey, Detective Nathan Jones, Camden City Police Department, Captain Philip Large, and Detective Bill Large, the Prosecutor's Office.

Q. Was there anyone else arrested at the time?

A. Noah Hamilton.

Q. Where were they taken?

A. They were taken immediately to the Camden City Detective Bureau.

Q. Were you present at the time the automobile was towed away?

A. No, I was not.

Q. When you arrived at the detective headquarters with Godfrey, what took place there?

A. We have two detention rooms that we use for interrogation, and they were put in separate rooms.

They were stripped of all their clothing, searched and coveralls were secured from the County Jail and they were put in these coveralls.

Q. Keep your voice up.

A. They were stripped of all their clothing, searched, and their clothing turned into identification and records room. Coveralls were secured from the County Jail and they were placed upon the two men.

MR. HEINE: You may cross-examine.

(188a) CROSS-EXAMINATION.

BY MR. FLUHARTY:

Q. Sir, did you make any report in connection with the apprehension of Mr. Godfrey or Mr. Hamilton?
A. No, I don't believe I did, sir.

MR. FLUHARTY: Nothing further.

MR. BERTMAN: Will Your Honor bear with me a moment?

THE COURT: Yes.

MR. BERTMAN: I have no questions.

MR. CAGGIANO: No questions.

GOLDEN SUNKET, sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Sunket, by whom are you employed?
A. City of Camden.
Q. In what department?
A. Police Department.
Q. How long have you been employed in the Police Department?

(199a) A. Fifteen years.

Q. What branch of the Police Department do you work in?

A. The Camden Detective Bureau.

Q. How long have you been in the Detective Bureau?

A. A little over a year.

Q. Prior to that were you on the regular police force?

A. Yes, sir.

Q. Were you present at the time Wayne Godfrey was arrested?

A. I was.

Q. When and where did this arrest take place?

A. It took place at the Little Click Cafe, Locust and Chestnut Streets, on the 28th of January, on Tuesday afternoon, about 1 P. M., approximately 1 P. M.

Q. Where is Locust and Chestnut Streets located in relation to the 200 block of Kaighn Avenue?

A. Just a matter of a couple of squares away.

Q. Who was with Godfrey at the time Godfrey was arrested?

A. Noah Hamilton.

Q. Were you present at the time that Godfrey was taken to the detective headquarters?

A. I was.

Q. Did you hear Detective O'Brien testify as to what happened to Godfrey when he arrived there?

A. Yes, sir, I did.

Q. Is there anything that you want to add or take away from Mr. O'Brien's testimony?

MR. BERTMAN: I object to that type of question, if Your Honor pleases.

THE COURT: I will sustain the objection.

(200a) Q. What took place at the time when Godfrey was brought into detective headquarters?

A. Noah Hamilton and Godfrey were placed in separate rooms in the detective bureau and their clothing was taken away from them and overalls from the county, the Camden County Jail, were supplied to them for their use.

Q. When Godfrey was taken out of the Little Click Cafe, were you there when his car was towed away?

A. No, I was not. I was on the way in to the detective bureau with him, accompanying him.

Q. Were you present when the car was identified?

A. No, I was not.

MR. HEINE: You may cross-examine.

MR. FLUHARTY: No questions.

MR. CAGGIANO: No questions.

MR. BERTMAN: Will Your Honor bear with me?

THE COURT: Yes.

MR. BERTMAN: I have nothing further.

THE COURT: You may be excused, sir.

(201a) HARRY TRACY, sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Tracy, by whom are you employed?
A. By the police department, City of Camden.
Q. How long have you been so employed?
A. Eighteen years.
Q. What branch of the police department do you work in?
A. Detective Bureau.
Q. How long have you been in the Detective Bureau?
A. Since 1946.
Q. Prior to that time you were on the regular police force?
A. I was.
Q. Did you have occasion to arrest Stanley Cassidy?
A. I did.
Q. When did you arrest him?
A. About 4:00 A. M. on Wednesday morning, January 29.
Q. Where was he at the time you arrested him?
A. His home, 312 Pine Street.
Q. Who was with you at the time?
A. Captain Philip Large, Bill Large from the County detectives, Lieutenant Conly, Detective O'Brien, Jones, Sunket and myself from Camden.
Q. Now, when you arrested him where did you take him?
A. To the Detective Bureau.
Q. In City Hall here?
A. That's right.

Q. What happened to him when you took him there?

(202a) A. Well, he was taken there, see if he had anything on him and questioned.

MR. HEINE: Cross-examine.

MR. FLUHARTY: No questions.

MR. CAGGIANO: No questions.

MR. BERTMAN: No questions.

(Witness excused.)

NATHANIEL JONES, sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Jones, by whom are you employed?
A. City of Camden.
Q. What department?
A. Police department.
Q. How long have you been so employed?
A. Since 1944.
Q. Fourteen years?
A. Yes, sir.
Q. Or so?
A. Yes.
Q. What branch of the police department do you work in?

(203a) A. Detective Bureau.

Q. How long have you been in the Detective Bureau?

A. Since 1949.

Q. Before that you were on the regular patrol force?

A. Yes, sir.

Q. Now, did you, were you present at the time that Stanley Cassidy was arrested?

A. Yes, I was.

Q. Will you tell us when and where that took place?

A. It was on the 28th of January, 1958, at 312 Pine Street, approximately 4:00 o'clock in the morning.

Q. And after Cassidy was arrested where was he taken?

A. To the Detective Bureau, Room 515, City Hall.

Q. What happened there?

A. He was turned over to the members of the Prosecutor's staff.

MR. HEINE: Cross-examine.

MR. BERTMAN: No questions.

MR. CAGGIANO: No questions.

MR. FLUHARTY: No questions.

(Witness excused.)

(204a) VINCENT CONLY, sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Conly, by whom are you employed?
A. City of Camden, Department of Public Safety.
Q. And how long have you been so employed?
A. Eighteen years.
Q. What branch of the department do you work in?
A. I am assigned to the Detective Bureau.
Q. How long have you been employed in the Detective Bureau?
A. Since approximately 1935.
Q. Prior to that time you were on the regular police force?
A. Plainclothesman and regular police force.
Q. Did you have occasion to arrest Sylvester Johnson?
A. Yes, I did.
Q. Where and when did that take place?
A. It took place Wednesday, January 29, at 732 on Hunterdon Street, Newark, New Jersey.
Q. Who accompanied you at that time?
A. Why, it was the County Detective Harry Gabor, Sergeant Tracy, Detective Jones, Dunn, O'Brien and myself.
Q. Where was Johnson taken to?
A. He was taken to the Newark Detective Bureau, later that night arraigned before the municipal judge in Newark and brought to Camden the following morning.
Q. And when you reported to Camden where was he taken to?

A. Directed to the Prosecutor's office.

(205a) Q. What time did you arrive in Camden?

A. I'd say about 5:00 o'clock in the morning, between four and five.

Q. When he was taken to the Prosecutor's office in Camden, did you remain there?

A. Yes, I did.

Q. Did you question him at that time?

A. No. I sat in on the questioning when he was questioned by Chief Dube.

MR. HEINE: You may cross-examine.

CROSS-EXAMINATION.

BY MR. BERTMAN:

Q. Mr. Conly, what time was it that you brought Johnson back from Newark?

A. Early hours of Thursday morning, between four and five o'clock in the morning, I believe, approximately.

Q. Where was it that you had apprehended him?

A. At the home of his uncle, I believe his name was Joseph Evans, 732 Hunterdon Street, Newark, New Jersey.

Q. What time was it that you had apprehended Johnson in Newark?

A. In the early evening; approximately somewheres after five o'clock, I believe.

Q. Somewhere after five o'clock?

A. Yes.

Q. From the place where you had apprehended him, where did you then go?

A. Newark Detective Bureau.

Q. How long did you stay there?

(206a) A. Well, we turned him into the authorities there and we waited until night Court.

Q. Was night Court had as a regular session, or was it a special session for this matter?

A. No, regular session.

Q. Did Sylvester Johnson appear in Court?

A. Yes, he did.

Q. Did he have representation?

A. No, he didn't; but the judge advised him of his rights.

Q. How long did you stay in Court?

A. Between a half-hour and three-quarters-of-an-hour, something like that.

Q. What time did you leave Court?

A. Maybe between ten and eleven, something like that. I'm not too sure of the time.

Q. Where did you go then?

A. We made arrangements to stay in a hotel overnight at Newark and we put him back in the city jail in Newark, and in the meantime we had received a call from Lieutenant Neill, telling us to come right back, so we left there and came right back.

Q. What time did you put him in the city jail?

A. I don't recall the exact time.

Q. What time did you leave from Newark to go to Camden?

A. Approximately two o'clock in the morning, I think.

Q. And you got back to Camden about between four and five?

A. Around that time, yes.

Q. You took him where?

A. Directly to the Prosecutor's office.

Q. When you get to the Prosecutor's office, who was present?

(207a) A. Why, Chief Dube, Lieutenant Neill, William Large and myself. Captain Phil Large had been there, but he left to go home.

Q. Was he taken up into the County jail?

A. No, he was taken directly to the Prosecutor's office.

Q. Now, you had picked him up, you say, at about five o'clock in the early evening or late afternoon before, isn't that correct?

A. That is true.

Q. When you picked him up, where was he?

A. As I said before, he was at his uncle's home, 732 Hunterdon Street.

Q. Was he up and about, or was he in bed?

A. He was sitting watching television when we went in the house.

Q. From the time that you saw him, from five o'clock that afternoon up until you brought him back from Newark, did he have any sleep at all?

A. Well, I don't know what he was doing in the jail. He probably did.

Q. Well now, you say you brought him to the jail between when, what hours?

A. Between five and six, approximately. That is when we picked him up, took him in. I next saw him again when we went into Court. He was placed back in jail and then we took him out again in the early hours of the following morning.

Q. Did he sleep on the ride back from Newark to Camden?

A. I believe he dozed off a little bit.

Q. Wasn't he questioned at all?

A. We were talking to him about the crime, yes.

Q. Talking to him?

(208a) A. We were talking to him, yes.

Q. You were questioning him, were you not?

A. Yes, at times.

Q. Sir?

A. At times.

Q. Did he doze off in-between the questions that you were asking him?

A. No, I wouldn't say.

Q. You said that he dozed off from time to time.

A. Yes, he would doze off. We wouldn't be talking to him when he was sleeping.

Q. I ask you, did he doze off between the questions? Was your questioning steady, or did you stop from time to time to permit him to doze off or to rest?

A. No. He was riding along and there was no sustained questioning or anything like that. Just a question mentioned to him once in awhile.

Q. But he did not sleep, did he?

MR. HEINE: If Your Honor please ——

A. He would take a nap once in awhile, I believe; not a matter of sleep.

Q. He would take a nap once in awhile?

A. Just doze off, yes.

Q. Now, this whole trip took less than two hours, did it not, from Newark to Camden?

A. About that.

Q. You say he would take a nap once in awhile?

A. Well, he'd be laying back with his head, his eyes closed. I assumed he was taking a nap.

Q. Well, you as a detective found it necessary to question him, did you not?

(209a) A. I talked to him. We stopped to get coffee at a Howard Johnson's on the way back and he had cuffs on him and we took him into a Howard Johnson Shop there.

MR. HEINE: Keep your voice up.

A. I stopped at the Howard Johnson and we took him into the restaurant and asked him if he wanted coffee, or anything he wanted to eat, and he ——

Q. You are not answering my question. I asked you whether you as a detective found it necessary, or considered it necessary to question him in regard to an alleged crime that had taken place?

A. I said, yes, we had.

Q. Now then, and you were performing your duty, were you not, on your way back from Newark to Camden?

A. Yes.

Q. When you got to the Prosecutor's office here, did you notice whether or not there were any accommodations for Johnson to rest or to take a nap?

A. I wouldn't know that.

Q. Sir?

A. I wouldn't know that.

Q. When did the questioning start here in the Prosecutor's office?

A. Practically immediately when we ——

Q. How long did the questioning continue, to your knowledge?

A. I don't recall the exact time that the questioning took.

Q. How long did you stay there?

A. I don't recall, but I think it was around noon or later that I left.

Q. Noon?

(210a) A. That I left the Court House, or the Prosecutor's office.

Q. That would be twelve o'clock the next day?

A. That's when I left.

Q. When you left he was still being questioned, was he not?

A. No.

Q. Had they finished with the questioning?

A. Oh, before that. I stayed around after the questioning.

Q. Sir?

A. I stayed around after the questioning.

Q. What time did they finish with the questioning?

A. I don't recall just what time it was.

Q. Were you present when the court stenographer came in?

A. Yes, I was.

Q. Can you tell us approximately what time that was?

MR. HEINE: If Your Honor please ——

A. I can't recall the exact time.

MR. HEINE: I have been a little tolerant with Mr. Bertman's questions.

MR. BERTMAN: I do not want the Prosecutor to be tolerant of anything I do. Let us have that understood.

MR. HEINE: Just a moment. But this is far beyond the scope of the direct examination. I will bring the testimony back when we are ready to prove the confessions and we can then talk about that, but this lieutenant and this

wit- (211a) ness has not been asked at all about the questioning of Johnson and the like afterwards, or how much sleep and so forth.

If he is trying to lay the groundwork for objecting to the confession, this is something else again. This is not the witness and this is not the proper time to do that. For those reasons I object to it.

THE COURT: Mr. Bertman, you will have an opportunity to explore this area which you are starting on now and, technically, it is not proper cross-examination.

MR. BERTMAN: If Your Honor please, I don't know whether he'll be brought back or not.

THE COURT: I just heard the Prosecutor say that he would, and I would think that he would have him here if he was present when the confessions were taken.

MR. BERTMAN: If Your Honor please, regardless of the time when the Prosecutor wants to introduce the confessions, the fact remains that this man was there, and I have a right to ask what happened at that time.

THE COURT: Well, the only point the Prosecutor has developed is that this defendant was turned over to Captain or Chief Dube and then he stopped. Now you are probing into what occurred after that and that has not been developed on direct examination. You will have the opportunity to explore that phase of it when the proper time comes. I do not feel it is proper cross-examination now.

MR. BERTMAN: May I have an exception. That being

Your Honor's ruling, I have no further questions (212a) at this time and I assume that this witness will be brought back later.

THE COURT: That is my assumption too.

MR. HEINE: We will bring back all of the witnesses who were present at the time the confessions were made.

THE COURT: All right. Any other questions, counsel?

MR. FLUHARTY: No questions.

WILLIAM O'BRIEN, recalled.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Detective O'Brien, were you present at the time that Sylvester Johnson was apprehended and arrested in Newark?

A. Mr. Prosecutor, I was not in the house. I was outside.

Q. You were there at the time?

A. That is correct.

Q. When was he arrested in Newark?

A. I would estimate it between five and six. It was turning dusk, almost dark.

Q. After you arrested Johnson what did you do with him?

A. We took him into New York—the Newark Detective Headquarters where they mugged and printed him.

(213a) Q. Did you accompany him when he was returned to Camden?

A. I did.

Q. When was he brought back to Camden?

A. I think we left Newark in the neighborhood of two o'clock, Mr. Prosecutor. I don't know the exact time.

Q. What time did you arrive in Camden?

A. I would say around 4:30.

MR. HEINE: You may cross-examine.

CROSS-EXAMINATION.

BY MR. BERTMAN:

Q. During the ride back from Newark to Camden, did Sylvester Johnson sleep?

A. He could have dozed off, Mr. Bertman. I did most of the driving back.

Q. Sir?

A. He could have dozed off. I did most of the driving on the way back.

Q. How many were in the car?

A. How many in the car?

Q. Yes.

A. Lieutenant Conly, Sergeant Tracy, Johnson and myself.

Q. There were four of you in the car?

A. That is correct.

Q. The purpose in going to Newark was to apprehend Johnson, was it not?

A. That is correct.

Q. Did you not feel it imperative or part of your (214a)

duty to question Johnson in connection with this alleged crime?

A. Well, there were two men sitting in the back with him. I think they were capable.

Q. They were questioning him, were they not?

A. There was conversation in the back of the car, yes.

Q. Did you see him doze off?

A. I really could not answer that, Mr. Bertman.

Q. Well, sir, most of the time there was questioning, was there not, concerning this matter?

A. I said there was conversation.

Q. Conversation?

A. Yes.

MR. BERTMAN: That is all I have.

RE-DIRECT EXAMINATION.

BY MR. HEINE:

Q. Did you say that you were doing the driving?

A. I did most of it, Mr. Prosecutor.

Q. Where was Johnson sitting?

A. He was sitting in the back between Lieutenant Conly and Sergeant Tracy.

MR. HEINE: That is all.

MR. CAGGIANO: No questions.

MR. FLUHARTY: No questions.

THE COURT: You may be excused, sir.

(215a) PHILIP LARGE, sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Captain, by whom are you employed?

A. County of Camden, sir.

Q. In what capacity?

A. Captain of the county detectives.

Q. How long have you been employed by the county detectives?

A. Since 1949.

Q. Since 1949, did you say?

A. Yes.

Q. Prior to that time, the time that you were a county detective, did you have any other police employment?

A. I was employed as a patrolman by the City of Camden.

Q. How long were you employed by the City of Camden on the police force?

A. 1938.

Q. Therefore, you have been connected with police work continuously since 1938?

A. Yes, sir.

Q. Were you present at the time that Wayne Godfrey was arrested?

A. I was, sir.

Q. Where was that?

A. It was in a taproom known as the Little Click Cafe at Locust and Chestnut Streets in the City of Camden.

Q. After Godfrey was arrested—incidentally, was there anyone else apprehended at the same time?

(216a) A. Yes.

Q. Who was that?

A. Noah Hamilton.

Q. After Godfrey was arrested along with Noah Hamilton, what happened to Godfrey's automobile?

Did you see it?

A. Yes, sir.

Q. Where was it?

A. Sitting on the outside of the Little Click taproom.

Q. What happened to the automobile?

A. When Mr. Godfrey was apprehended, he was searched and there was a set of automobile keys taken from him.

He identified the keys as being the ones that belonged to a 1947 Buick that was sitting outside the taproom, and he was taken out and identified that as his car.

I notified the City Police Department garage to bring a tow truck and take the car to the Bridge Garage at Seventh and Linden Streets in the City of Camden.

Q. Did Mr. Godfrey identify the car as belonging to him at the time?

A. Yes, sir.

Q. Did you observe the car?

A. Yes, sir.

Q. What make car was it?

A. A Buick.

Q. Do you know what year?

A. I believe a '56 or '57.

Q. What color was it?

A. Two-tone color.

Q. What colors were they?

A. White on top; red on the bottom.

MR. BERTMAN: If your Honor pleases, the questions and answers came so fast with this witness and, I am sure,

(217a) not intentionally, but I was taken unawares and I wonder, I want to record an objection.

A question was asked whether or not Wayne Godfrey admitted that the car was his, and the answer, naturally, has already been given, but, if your Honor pleases, some time ago we made a motion for statements, confessions or admissions that any defendants made to anyone and, if your Honor pleases, I feel that my motion at that time embraced any oral admissions or statements or confessions.

At that time I asked if there were any oral admissions or statements or confessions, and if there were any, that we be furnished with either a copy of the same or be permitted to take depositions of the same.

I want to voice my objection, if your Honor pleases, to the fact that here was a statement or an admission made by one of the defendants in this case of which we have had no prior notice.

I, therefore, ask that it be stricken. I realize my objection may come a little late, but for the purpose of the record, and in view of the fact that the question and answer did come in inadvertently so fast, and I was not alert enough at the time to make any objection, I want to at this time make my objection and ask that the answer be stricken.

If there are any other admissions or statements by any of these defendants, whether they be oral or not, I ask that we be given prior notice of the same in advance of the witness' testimony.

MR. HEINE: May I refresh Mr. Bertman's recollection as well as the other attorneys to the fact that they tried to stipulate that this was Mr. Godfrey's car. That is that the car shown in these pictures was agreed to and admitted to

by them as belonging to Mr. Godfrey. This is merely corroborative of that stipulation.

(218a) This does not come as a surprise.

THE COURT: Mr. Bertman, you made an objection on the record. What do you want me to do?

MR. BERTMAN: If your Honor pleases, because of the fact that this question and answer came in so fast, and because there may be others of a similar nature, I want to put on the record that I am objecting to any admissions made by a defendant regardless of whether we have stipulated or not.

I want to put that on the record and make it a part of this record that that should not be brought out during the course of the trial because we have not received a copy or have been permitted to take depositions of any statements, oral statements that may have been made by any defendants.

THE COURT: I will rule on objections as they are made. I want to rule on this particular objection.

What do you want me to do?

MR. BERTMAN: I want to note on the record, if your Honor pleases, and ask that that particular answer be stricken.

THE COURT: I will deny your motion.

BY MR. HEINE:

Q. Captain, I show you a car which is shown in the photo-

graph S-20 and ask you whether or not this is the car that was outside of the Little Click Cafe at the time that Godfrey was apprehended.

(219a) A. Yes, this is a picture of that car.

Q. And I ask you to look at the car shown in pictures or photographs marked S-19 and S-21 and ask you whether or not this is the same car.

A. Yes, they are pictures of the same car.

MR. HEINE: Cross-examine.

MR. FLUHARTY: No questions.

MR. BERTMAN: No questions.

MR. CAGGIANO: No questions.

THE COURT: I assume, Mr. Prosecutor, that the references to Godfrey, the references to Johnson and the references to Cassidy are the defendants in this court room. I don't think they have been specifically identified but I don't think we could assume anything else, unless there may be strict proof required. I am at a loss to know whether that is a fact or not; I assume it is.

MR. HEINE: We will clear this up right now.

BY MR. HEINE:

Q. Do you know Wayne Godfrey?
A. Yes.
Q. Did you recognize him in the court room?
A. Yes.

Q. Will you please stand up and point Mr. Godfrey out.
A. The gentleman on the left with the brown suit.

(220a) MR. HEINE: Will the record show—you better step down and place your hand on Mr. Godfrey's shoulders.

THE WITNESS: This one.

MR. HEINE: Now will the record show that Captain Large placed his hands on the defendant, Wayne Godfrey's, shoulder.
Any question about that?

MR. FLUHARTY: No question.

MR. HEINE: That's all.

(Witness excused.)

DETECTIVE NATHAN JONES, recalled.

BY MR. HEINE:

Q. Detective Jones, I believe you were present at the time that Stanley Cassidy was arrested?
A. Yes, sir.
Q. You testified to that?
A. Yes, sir.
Q. You recognize Cassidy now?
A. Yes.
Q. Will you please step down from the witness stand and point out Mr. Cassidy?

(Witness complies.)

(221a) MR. HEINE: May the record please show that Detective Jones placed his hand on defendant, Stanley Cassidy's, shoulder.

Any questions about that, Mr. Caggiano?

MR. CAGGIANO: No question.

(Witness excused.)

VINCENT CONLY, recalled.

BY MR. HEINE:

Q. Lieutenant, you previously testified that you were present when Sylvester Johnson, one of the defendants here, was apprehended in Newark, is that right?

A. Yes.

Q. Do you recognize the defendant, Johnson, in court now?

A. I do.

Q. Will you step down from the stand and point him out?

(Witness complies.)

MR. HEINE: May the record please show that Lieutenant Conly placed his hand on the defendant Johnson's, shoulder.

I ask Mr. Bertman whether or not he will agree that is so.

MR. BERTMAN: You want me to try your case, Mr. Prosecutor?

(222a) MR. HEINE: No, I don't.

MR. BERTMAN: I will agree.

MR. HEINE: That's all, thank you.

(Witness excused.)

* * * * * * * * *

(Commencing 310a-7.)

THE COURT: Members of the jury, there are certain questions which have been raised, which present a legal problem and not a factual problem, which means that I will have to hear this testimony and pass upon its legal efficacy, so it is no problem of yours.

You are now going to be excused while I hear that field of testimony. We are now approaching—I think the clock says 12:30—we will be at least till one o'clock and maybe when we adjourn we may have to continue at two o'clock out of your presence.

So, you are excused now and I would suggest that the jury be taken to the assembly room at two o'clock, and if we are fortunate to have completed by that time I will so notify the attendants. If not, they will have to remain there until we conclude this period of testimony.

Now, since I last told you this, there has been some testimony which might provoke discussion. Now, I am going to ask you again, and I haven't done this every day because

you are intelligent enough not to be told that every day, I am going to tell you once more, not to discuss any of the testimony that you heard up to this time. The only time you must discuss the testimony is when all of it is in and you are in the jury room deliberating, and not until then. You are excused until two o'clock.

(Jury leaves the courtroom at 12:35 P. M.)

THE COURT: Now, for the purpose of the record, Mr. Fluharty and Mr. Caggiano and Mr. Bertman, it has been suggested, as I understand it from counsel for the defendants, that the question of whether or not any confessions or (311a) statements were voluntary, should be made out of the presence of the jury, and I have dismissed the jury and I am ready to proceed with that evidence now.

MR. CAGGIANO: That is my position, Your Honor.

MR. BERTMAN: Yes.

THE COURT: Counsel agree with that statement? Do all counsel agree with that statement?

MR. FLUHARTY: Yes.

MR. BERTMAN: That any questions ——

THE COURT: As to the voluntary nature.

MR. BERTMAN: Shall be made not in the presence of the jury?

THE COURT: That's right.

MR. BERTMAN: Yes.

THE COURT: In other words, you have a right, Mr. Bertman, to hear the same testimony all over again if you so desire.

MR. BERTMAN: All right.

THE COURT: But I am going to pass upon it in the absence of the jury, to determine whether or not any state-
(312a) ment, or confession, or confessions, or statements were voluntary.

MR. BERTMAN: Good enough.

THE COURT: All right.

WILFRED DUBE, recalled.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Chief Dube, were you present when the defendant, Stanley Cassidy, was interrogated?

A. Yes, I was.

Q. Where and when did that take place?

A. The interrogation started on January 29, Wednesday, at about 9:00 A. M., in my office in the Prosecutor's office in the Court House, on the Sixth Floor.

Q. Was there anyone else present at the time?

A. Sergeant Conly from the Camden Police Department; Captain Philip Large from my office, the Prosecutor's office, and Mr. Fred Albert, the Official Court Stenographer.

Q. Prior to his interrogation, was anything said to him?

A. Yes, sir.

Q. What was said?

A. I identified myself to him as being Chief of the County Detectives; I identified Sergeant Conly of the Camden City Detective Bureau to him; I identified Captain Philip Large from my office. I told him where he was, that was (313a) in the Court House on the Sixth Floor in the Prosecutor's Office, in my office, and I told him that I was going to, I told him rather that last Friday, the previous Friday night, January 24, there had been a holdup at a store at 1731 Broadway in which the proprietor, Mr. Davis, had been shot and as a result of that shooting, a short time later, died in the Cooper Hospital.

I told him that I was going to ask him some questions concerning how Mr. Davis received this injury, but that before I ask him these questions, that it was my duty to warn him that everything he told me must be the truth, must be of his own free will, without any threats or promises having been made to him, and knowing further that anything I asked him and any answers he made could be used against anyone else at some future time in Court.

I asked him if he had understood everything I just said to him and he said he did. I asked him would he answer my questions and he said he would.

Q. Now, at the conclusion of this confession, were the questions and answers read back to him?

A. At the conclusion of his confession, I instructed the stenographer to read back all of the questions I asked him, all of the answers he made to them. After that was done

I came back into the room. I asked him if he had just heard all of the questions read to him and all of the answers that he made to those questions, and asked him would he acknowledge that the answers he made to the questions and the answers he had made to the questions I had asked him, and he said that that was so.

Q. Were any threats made to this defendant?

A. There were no threats made.

Q. Were any promises made him?

A. There were no promises made to him.

(314a) Q. Was he intimidated in any way?

A. He was not intimidated, threatened, or promised anything in any way.

Q. Was there any physical act of violence or assault used?

A. No physical act of violence or assault in any form.

Q. Who was present at the time that the questions and answers were read back to Cassidy?

A. There was no one present. The questions and answers were read back to him by Mr. Albert, the stenographer, just by himself.

Q. No one else was in the room besides those two?

A. No, sir.

Q. Albert and Cassidy?

A. That's right.

MR. HEINE: You may cross-examine.

MR. CAGGIANO: Defendant Cassidy does not admit but does agree with all answers given by Chief Dube.

MR. FLUHARTY: No questions.

CROSS-EXAMINATION.

BY MR. BERTMAN:

Q. Chief Dube, I understand by your answer that you stated to Cassidy that you were going to question him concerning the events that took place on this particular evening and that anything he said could be used against him or anyone else. Is that correct?

MR. HEINE: Just a moment.

(315a) MR. BERTMAN: I am asking him whether or not he said that.

MR. HEINE: I am objecting to Mr. Bertman interrogating this witness concerning Mr. Cassidy's confession, since the voluntariness and completeness of Chief Dube's testimony has not been questioned in any way.

THE COURT: Aren't we going to the voluntary phase of this and not to an exploration of what was said?

MR. BERTMAN: If your Honor please, I feel that if there is evidence to the effect that the questions and answers given to Cassidy in some way might affect my client, I feel I am entitled to ask what he warned Cassidy. In other words, it appears to me that in his answer to the Prosecutor that Chief Dube did say that anything that "you would say could be used against you or others."

If your Honor please, I don't understand that to be the law. So that it appears to me that what Chief Dube did say to Cassidy, although most likely not intentional, was a mis-

representation of the law and in some way that would affect or prejudice my client's interest.

THE COURT: But are we concerned with your client's confession now?

MR. BERTMAN: No, we are not. But any confession or what is contained in the confession of others might have lured or led that person into making statements by representations or by erroneous representations of Chief Dube. It might have lured them into making statements they otherwise would not have made.

(316a) MR. HEINE: If your Honor please, this is not the test. We are now talking about the voluntariness of the confession.

In addition to that, I want to point out to the Court that there is no need to warn the witness of anything.

THE COURT: I understand there is no duty to warn.

MR. BERTMAN: There is no duty, but having done so I feel that a proper warning should have been made.

MR. HEINE: In addition to that, if your Honor please, I assume that if, as and when these confessions will be read in the court, that your Honor will instruct the jury that these are not to bind anybody except the confessor.

THE COURT: That is right. I am going to sustain the objection to the question, Mr. Bertman.

MR. BERTMAN: I have nothing further.

CROSS-EXAMINATION.

BY MR. CAGGIANO:

Q. Chief Dube, to your knowledge do you know whether or not the defendant, Stanley Cassidy, was interrogated before you came into the room and before you commenced with your interrogation?

A. Mr. Cassidy was brought into the room, and to my office, and at that time I began the interrogation.

Q. You do not know whether he had been interrogated prior to that?

(317a) A. I don't know what happened. I was in my office when he was brought in.

MR. CAGGIANO: I have nothing further.

MR. FLUHARTY: I have nothing.

VINCENT CONLY, having been previously sworn, resumed the stand and testified further as follows:

RE-DIRECT EXAMINATION.

BY MR. HEINE:

Q. You were previously sworn in this case?

A. Yes, sir.

Q. Were you present when the defendant, Stanley Cassidy, was interrogated?

A. Yes, sir.

Q. Where did the interrogation take place?

A. In Chief Dube's office, the Prosecutor's office.

Q. Was there anyone else present at the time?

A. Yes. There was Captain Large and the court stenographer.

Q. Prior to his interrogation did you hear anything said to him?

A. Yes. Chief Dube warned him about what he would say and so forth, told him where he was, introduced the men present and the court stenographer.

Q. Did he make any answer to Chief Dube's statement and warning?

(318a) A. Told Chief Dube that he would make a statement.

Q. Were you present at the conclusion of his confession when the answers and questions were read back to him?

A. No, I wasn't.

Q. Were you present when he acknowledged the correctness of the questions and answers?

A. Yes. You mean afterwards?

Q. Afterwards.

A. After the statement was read back to him?

Q. Yes.

A. No.

Q. You were not present then?

A. I was there at the finish of the statement.

Q. Were you present then at the finish of the statement?

A. Yes.

Q. Did he acknowledge that these were the questions that were asked of him and that these were the answers that he gave to those questions.

A. I don't recall that, Prosecutor.

Q. Were any threats made to Cassidy?
A. No.
Q. Were any promises made to Cassidy?
A. No.
Q. Was he intimidated in any manner?
A. No, sir.
Q. Was any physical acts of violence or assault used?
A. No, sir.

MR. HEINE: You may cross-examine.

(319a) RE-CROSS EXAMINATION.

BY MR. CAGGIANO:

Q. Lieutenant Conly, of your own knowledge, do you know whether or not statements of witnesses, more particularly, Noah Hamilton, was read to Stanley Cassidy?
A. What was that again?
Q. The statement made by a witness, Noah Hamilton, do you know whether or not that statement was read to Stanley Cassidy?
A. No, I don't.

MR. HEINE: Just a moment. The witness says he does not know. The question, I think, is improper. We are talking about the voluntariness of the confession, not the contents.

MR. CAGGIANO: Your Honor ——

THE COURT: He has answered it. He said no.

Q. Prior your going into Chief Dube's office and before the taking of the statement and the questioning by Chief Dube, had the defendant, Stanley Cassidy, been interrogated?

MR. HEINE: Object to this, if your Honor please. This is not on the question of voluntariness.

THE COURT: It might be. I will allow this question.

A. Yes.

(320a) Q. Where was that question?

A. That question was in the Prosecutor's office there. It could be either in Captain Dube's office or the office next door.

Q. Who was the interrogating officer?

A. I believe it was Captain Large.

Q. Captain Large?

A. Yes, sir.

Q. Were you present during that interrogation?

A. Well, there was a talk to him, asked him what his activities were during the commission of this crime.

Q. Question him as to the happening of this crime, did you not?

A. That's right.

Q. Do you remember how his questions started? How did this open?

A. Wasn't a formal statement taken. It was just told him why he was there and everything he said could be used for or against him.

Q. He was advised of his rights?

MR. CAGGIANO: No further questions.

MR. FLUHARTY: No questions.

MR. BERTMAN: No questions.

MR. HEINE: I have nothing further.

(321a) PHILIP LARGE, having been previously sworn, resumed the stand and testified as follows:

RE-DIRECT EXAMINATION.

BY MR. HEINE:

Q. Were you present when the defendant, Stanley Cassidy, was interrogated?

A. Yes, I was.

Q. Do you remember when that was?

A. Wednesday morning, January 29, I believe, 1958.

Q. Who else was present at the time?

A. Sergeant Conly of the Camden City Detective Bureau and Chief Wilfred Dube of the Camden County Prosecutor's office, Mr. Freddie Albert, the Court Stenographer for the County of Camden.

Q. Where did the interrogation take place?

A. Chief Dube's office in the Prosecutor's office.

Q. Prior to his interrogation was anything said to him?

A. Chief Dube gave him the usual warning that is given to all persons prior to their making a statement.

Q. And what answer did Cassidy make to Chief Dube's warning?

A. Mr. Cassidy said he understood it and that he was

willing to make a statement and answer Mr. Dube's questions.

Q. At the conclusion of his confession were you present when the questions and answers were read back to him?

A. No, I was not.

Q. Were you present when he acknowledged the correctness of the questions and the answers that he gave to those questions?

(322a) A. Yes, I was present then.

Q. Who was present when the questions and answers were read back to him?

A. I believe just Mr. Fred Albert and Mr. Cassidy himself.

Q. During any part of this time were any threats made on Cassidy?

A. No.

Q. Were any promises made to him?

A. No.

Q. Was he intimidated in any manner?

A. No, sir.

Q. Were there any acts, physical acts, violence or assault used against him?

A. No, sir.

MR. HEINE: You may cross-examine.

RE-CROSS EXAMINATION.

BY MR. CAGGIANO:

Q. Captain Large, prior to the statement made at the instance and interrogation of Chief Dube, did you question this defendant?

A. Yes, sir.

Q. Prior to your questioning him did you threaten him?

A. No, sir.

Q. Did you make him any promise?

A. No, sir.

Q. Was this defendant intimidated by anyone, to your knowledge?

A. No, sir.

(323a) Q. By you?

A. No, sir.

Q. Prior to your questioning did you advise him of his rights?

A. Yes, sir.

MR. CAGGIANO: No further questions.

MR. FLUHARTY: No questions.

MR. BERTMAN: No questions.

THE COURT: Suppose we take our luncheon recess. We will reces until 2:00 P. M.

(Luncheon recess.)

Discussion

(Afternoon session.)

THE COURT: Members of the jury, we are still pursuing the line of examination that I spoke to you about before lunch.

It looks very much like it will continue for a little while yet.

After that is concluded, I have called a conference of all the attorneys involved in the matter with a thought in mind that there are certain stipulations that might be entered into which, I believe, will shorten this case at least a day, if we are successful.

Therefore, I think what we better do is continue with this out of your presence, with this line of examination, which (324a) we must do, and then proceed on with the conference. That will take the rest of the afternoon, and if we are successful, I am sure it will lighten your burden for the rest of the week.

Do not misunderstand me, I do not mean it will end the case, but it will shorten it, I hope.

Therefore, you may now return to the hotel where I am sure it will be more comfortable for you than waiting in the room for me to send for you.

We will start promptly tomorrow morning at ten o'clock.

(The jury is excused for the day.)

MR. HEINE: Mr. Albert.

FRED W. ALBERT, sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Albert, you are the Official Court Stenographer in Camden County?

A. I am, sir.

Q. How long have you been the Official Court Stenographer in this county?

A. Going on thirty-eight years.

Q. Were you present when the defendant, Stanley Cassidy, was interrogated?

A. I was.

Q. Where did the interrogation take place?

(325a) A. The interrogation took place in the Prosecutor's office in this building.

Q. When?

A. On January 29, 1958.

Q. What time of the day?

A. Well, at various times; one commencing at nine o'clock A. M.

Q. Who was present?

A. Chief Wilfred Dube, Captain Philip Large, Sergeant Vincent Conly, and I.

Q. Prior to his interrogation, was anything said to Cassidy?

A. Chief Dube conducted the interrogation, and he warned Mr. Cassidy of his rights.

Q. I am sorry, I did not hear that.

A. He warned Mr. Cassidy of his rights.

Q. After Stanley Cassidy was warned of his rights, what answer did he make as to whether or not he was willing to make a confession?

A. I am reading for the record:

"Q. Under those circumstances, are you willing to answer my questions?

"A. Yes."

Q. You say you are reading from the record. Do you have any independent recollection of that other than what you just read?

A. I have a positive recollection that that is what occurred.

Q. At the conclusion of his confession, were the questions and answers read back to him?

A. Every single question and answer was read back to Mr. Cassidy.

Q. When I refer to "him" I mean Stanley Cassidy.

(326a) A. Yes.

Q. Did Stanley Cassidy acknowledge the correctness of the questions asked of him and the answers given by him in response to those questions?

A. He did, sir.

Q. When these questions and answers were read back to him, who was in the room?

A. May I refer to the record and I will tell you.

Q. Do you have any recollection other than the record?

A. Well, at one time Chief Dube was there alone and at another time Sergeant Neale and Detective Conly were there.

Q. Would referring to the record refresh your recollection?

A. Yes, sir.

Q. By referring to your record, tell us who was present

at the time the questions and answers were read back to Stanley Cassidy.

A. All right, sir.

The first portion of the statement, Chief Dube.

Q. I am only talking about the first portion of the statement.

A. Chief Dube only.

Q. Were any threats—were you present at the time the questions and answers were read back to him?

A. The entire time.

Q. I beg your pardon?

A. The entire time.

Q. During the time that you were there, were any threats made on this defendant?

A. No, sir.

Q. Were any promises made to him?

A. No, sir.

(327a) Q. Was he intimidated in any manner.

A. No manner whatsoever.

Q. Were any physical acts of violence or assaults used to obtain the confession?

A. None, sir.

MR. HEINE: You may cross-examine.

MR. BERTMAN: No questions.

MR. FLUHARTY: No questions.

CROSS-EXAMINATION.

BY MR. CAGGIANO:

Q. Mr. Albert, if I am correct, the statement was taken of the defendant, Stanley Cassidy, at 9:00 A. M. on the 29th of January, 1958? Is that so?

A. So my record shows.

Q. Did you then take a subsequent statement from the defendant Mr. Cassidy?

A. Yes, at 10:20.

Q. At 10:20?

A. That is right.

Q. Was there then a subsequent statement ——

MR. HEINE: If Your Honor pleases, I think Mr. Caggiano—I object to the question because I think Mr. Caggiano is getting ahead of me.

I was only proving the voluntariness of the first confession.

There were three confessions, or the confession consists (328a) of three parts. Cassidy was interrogated at three different times.

I want to prove each interrogation separately, and I merely confined myself to the first interrogation.

THE COURT: You won't proceed on the others?

MR. HEINE: I will as soon as Mr. Albert is finished with this one. I will then proceed with the subsequent interrogations.

MR. CAGGIANO: No questions.

WILFRED L. DUBE, recalled.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Chief Dube, what time did you commence the interrogation of Stanley Cassidy on Wednesday, January 29, 1958?

A. Nine o'clock in the morning.

Q. What time did the interrogation conclude?

A. About 10:20.

Q. In the morning or afternoon?

A. In the morning.

Q. Now, after that did you interrogate Stanley Cassidy further?

A. Yes, sir, shortly after noon, about 12:15, I again had Cassidy brought in and talked to him and took another statement.

(329a) Q. Now, where was that statement taken from him?

A. That statement was taken in my office, the same place that the previous statement had been taken.

Q. Who was present at the time the second interrogation was conducted?

A. Myself, Mr. Albert, the stenographer, and the defendant, Cassidy.

Q. Now, where did that interrogation take place?

A. In my office in the Prosecutor's office on the sixth floor.

Q. Prior to his interrogation at that time, at the time of 12:15, when you say you first commenced the second interrogation, was anything said to him?

A. I brought him in and said to him that I had taken a statement from him earlier in the morning in which he had told me concerning the facts of his participation in this holdup, and that at this time I wanted to ask him a few extra questions concerning his having had a gun, and I proceeded to ask him these questions.

Q. What time of the day did the second interrogation conclude?

A. About 12:40 or 45, it was just before one o'clock.

Q. Now, at the conclusion of this second interrogation were the questions and answers read back to Stanley Cassidy?

A. I asked the stenographer to read back all the questions that I had just asked Mr. Cassidy and I left the room while this was being done.

Q. Did Stanley Cassidy acknowledge the correctness of the questions asked of him and the answers given by him in response to those questions?

A. After the questions and answers had been read back to him I came back into the room and asked him if he had (330a) just heard the court stenographer read the questions I asked him and read the answers that he made to my questions, and I asked him if he acknowledged that those answers to my questions were the answers he made and if the questions I asked were the questions I asked him and he acknowledged that they were.

Q. During the second interrogation were there any threats made to this defendant?

A. No, sir.

Q. Were any promises made to him?

A. No promises, no threats.

Q. Was he intimidated in any manner?

A. No, sir, he was merely asked to answer some further questions.

Q. Were any physical acts of violence or assault used?

A. No, sir.

Q. Now, you stated that the first interrogation concluded about 10:25 A. M. and the second interrogation commenced about 12:15 P. M. Where was Stanley Cassidy in the meantime, those two hours?

A. After he had made the first interrogation, and the answers were read back to him, ending around 10:25, he was taken out of the room and then I commenced taking another statement from another defendant. I presume that he was taken in one of the other rooms in the Prosecutor's office where he was kept until I talked to him later at 12:15.

MR. HEINE: Cross-examine.

(331a) WILFRED DUBE, recalled.

CROSS-EXAMINATION.

BY MR. CAGGIANO:

Q. Chief Dube, when you took the second statement from the defendant, Cassidy, did you advise him of his rights at that time?

A. I believe I told him at that time, Mr. Caggiano, that I had taken a statement from him earlier in the morning, at which time he was advised of his rights and I wanted to ask him a few subsequent questions. I don't believe I said anything further to him. I asked him to answer them and he agreed.

Q. You later took a statement from the defendant, Cassidy, at 11:40 P. M.

A. That's correct.

MR. HEINE: If Your Honor please, that is the third part.

MR. CAGGIANO: We might as well continue with it.

MR. HEINE: I have no objection, but I want the record to show the voluntariness of each statement. I want to bring Mr. Albert back to confirm the second interrogation and I want to go through with the third, so that this record will show clearly just what he did and what he was advised of.

MR. CAGGIANO: No further questions.

(332a) FRED ALBERT, resumed the witness stand.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Albert, were you present at the time that the defendant, Stanley Cassidy, was interrogated for the second time?

A. Yes I was.

Q. What time of the day did the second interrogation commence?

A. 12:15 P. M.

Q. Where did this interrogation take place?

A. In the Prosecutor's office, Chief Dube's office, to be specific.

Q. Was there anyone else present at the time?

A. Yes, Chief Dube, the defendant and I.

Q. At the conclusion of the second interrogation, were the questions and answers read back to him?

A. Each and every question and answer was read to the defendant.

Q. Did Stanley Cassidy acknowledge the correctness of the questions asked of him and the answers given by him in response to those questions?

A. Yes, he did.

Q. Were any threats made to this defendant, Stanley Cassidy at that time?

A. None whatsoever.

Q. Were any promises made to him?

A. None.

Q. Was he intimidated in any manner?

(333a) A. No, sir.

Q. Were any physical acts of violence or assault used?

A. No.

MR. HEINE: You may cross-examine.

MR. BERTMAN: No questions.

MR. FLUHARTY: No questions.

MR. CAGGIANO: No questions.

MR. HEINE: Just one further question: What time did the second interrogation conclude?

THE WITNESS: 12:45 P. M.

MR. HEINE: That is all.

WILFRED L. DUBE, previously sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Chief Dube, following the second interrogation, did you interrogate Stanley Cassidy further that day?

A. Yes, sir. That same evening, just before midnight, at about 11:40, I again interrogated Stanley Cassidy.

Q. Who was present at the time of this third interrogation?

(334a) A. Myself, Mr. Albert and the defendant.

Q. Prior to this third interrogation, was anything said to him?

A. This time I told him that I was still asking him questions concerning the hold-up of Mr. Davis, that I had taken two previous statements from him and that there were one or two more questions that I wanted to find out from him concerning a gun, and asked him if he would answer my questions and he said he would.

Q. At the conclusion of this third interrogation were the questions and answers read back to him?

A. Yes, sir. I asked the stenographer to read the questions and answers back to him and I left the room. Shortly thereafter, upon this having been done by Mr. Albert, I came back in the room, again asked Mr. Cassidy if he had

heard the questions that I asked him read back to him and the answers he made, and asked if he would acknowledge that those were the questions I asked him and those were the answers he made to my questions, and he said he would.

Q. Did he acknowledge the correctness thereof?

A. He did.

Q. Were any threats made to Stanley Cassidy at the time this third interrogation took place?

A. No, sir.

Q. Were any promises made to him?

A. No, sir.

Q. Was he intimidated in any manner?

A. No, sir.

Q. Were there any physical acts of violence or assault used?

A. There was not.

Q. You previously stated that you had concluded the second interrogation about 12:45 P. M. and that this (335a) third interrogation commenced around 11:40 P. M. Where was Stanley Cassidy in the meantime?

A. After the second short statement I took that concluded at 12:45, I believe that Mr. Cassidy had been placed in the detention room in the Detective Bureau, where he was told to rest or do whatever he chose to do until I next asked for him that evening.

MR. HEINE: You may cross-examine.

MR. BERTMAN: No questions.

MR. CAGGIANO: No questions.

MR. FLUHARTY: No questions.

FRED ALBERT, previously sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Albert, were you present when the defendant, Stanley Cassidy, was interrogated a third time?

A. I was.

Q. What time did this third interrogation commence?

A. 11:40 P. M.

Q. What time did it conclude?

A. 11:50 P. M.

Q. Who was present at the time of this third interrogation?

(336a) A. Chief Dube, the defendant and I.

Q. At the conclusion of this third interrogation, were the questions and answers read back to him?

A. They were.

Q. Who read them back to him?

A. I did.

Q. Who read back the questions and answers of the first two interrogations?

A. I did.

Q. Did Stanley Cassidy acknowledge the correctness of the questions asked of him and the answers given by him in response to those questions as read by you?

A. He did.

Q. Were there any threats made to this defendant at the time of this third interrogation?

A. None.

Q. Were any promises made to him?

A. None.
Q. Was he intimidated in any manner?
A. Not in any manner.
Q. Were any physical acts of violence or assault used?
A. None.

MR. HEINE: You may cross-examine.

MR. CAGGIANO: No questions.

MR. FLUHARTY: No questions.

MR. BERTMAN: No questions.

MR. HEINE: If Your Honor please, I now feel that we have clearly established the voluntariness of these confes-
(337a) sions and I am prepared, whenever it meets the convenience of the Court and counsel, to have the confessions introduced in evidence.

THE COURT: Does the defendant, Cassidy, have any testimony or evidence that he desires to offer as to the voluntary nature of his confession, or confessions?

MR. CAGGIANO: No, Your Honor.

THE COURT: No evidence is offered in his behalf in this respect?

MR. CAGGIANO: That is correct.

THE COURT: I would therefore establish that the confession, or confessions of defendant, Cassidy, were voluntarily secured from that defendant.

Discussion

MR. HEINE: Now, if Your Honor please, since the jury is not in the court room at this time, I move that a reference in the Stanley Cassidy confession which appears on the third line of page 9, commencing ——

THE COURT: Is there a possibility of my having a copy of that so that I may follow you?

MR. HEINE: Yes, sir. I move, if Your Honor please, that the reference on the third line, commencing with the words "Police Department photograph 11837" be deleted from this confession before it is presented to the jury.

MR. BERTMAN: If Your Honor please, I feel that even (338a) the second line "I show you a picture of a man, Sylvester Johnson" certainly would tend to have the jury believe that this is a police photograph, whether it was so stated in that line or not. In fact, a Chief of Police will show a person a picture and say "I show you a photograph" certainly ——

THE COURT: Do you think, Mr. Heine, that that might create some conjecture in the minds of the jurors?

MR. HEINE: I do not see how. The question would then read, with the deletion that I have suggested: "I show you a picture of a man, Sylvester Johnson, and ask you if that is not Sylvester Johnson who came to your house?"

THE COURT: I know that, but wouldn't that create some question in the minds of the jurors that that could have been a police photograph?

Discussion

MR. HEINE: I don't see how. It is nowhere indicated that this is a police photograph. I don't see how there could be this kind of an inference.

MR. BERTMAN: I think it would, if Your Honor please, unless the Chief had explained: "I show you a snapshot that was taken of Sylvester Johnson while at a picnic," whatever it might be. If it had that explanatory remark in it, the jury could not guess or conjure up the thought that it was a police picture.

THE COURT: Couldn't they also conclude that they might have taken the picture of the man that night and shown him the picture? I mean, so far as conjecture is (339a) concerned, you might say the other. You might say that that particular night they took a picture of him.

MR. BERTMAN: If they took it that particular night, why, instead of taking the picture of him that night, they would have brought him in in person. Now, it seems to me that any reference to a picture would certainly tend to have the jury believe that this is a police photograph.

MR. BERTMAN: Personally, I do not see how it will harm the State by leaving that out.
I do not question the Prosecutor's motives, but his insistence.

THE COURT: He does name Sylvester Johnson throughout this.

MR. HEINE: Oh, yes.

MR. BERTMAN: There are other references to him.

Discussion

MR. HEINE: My only point is that, the only reason advanced for the deletion of the entire question is because the jury might conjecture as to what picture it is.

As long as we are getting into the realm of conjecture, they might conjecture anything. However, I do not think it is essential. I do not think there is any question that this is the Sylvester Johson, the named defendant, and if Mr. Bertman insists, I have no objection if the whole question and answer is stricken.

MR. BERTMAN: I ask that it be stricken.

THE COURT: The question and answer beginning on (340a) Line 2 and ending on Line 5 will be stricken and not referred to as the result of an objection by Mr. Bertman.

MR. BERTMAN: Is the stenographer making—is Mr. Albert making a note of that?

THE COURT: I think he better.
It is on Page 9, from Line 2 including Line 5.

MR. HEINE: I assume we may now proceed with the other confessions, your Honor?

THE COURT: Yes.

CHIEF WILFRED L. DUBE, recalled.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Chief Dube, were you present when the defendant, Wayne Godfrey, was interrogated?

A. Yes, I was.

Q. Where did this interrogation take place?

A. This interrogation took place in my office on the sixth floor of the court house in the Prosecutor's office.

Q. When did this interrogation take place?

A. On Wednesday, January 29, at about 10:25 in the morning.

Q. Was that January 29 of last year, 1958?

A. January 29, 1958.

(341a) Q. Was there anyone else present at the time?

A. At that time there was the defendant, Captain Philip Large, Sergeant Vincent Conly, Lieutenant William Neale from the City Detective Bureau and Detective William Large from my Prosecutor's office.

Q. Was this interrogation taken down stenographically?

A. Pardon me. Mr. Fred Albert, the Official Court Stenographer for Camden County, was also present.

Q. Prior to the interrogation of Wayne Godfrey, was anything said to him by you?

A. Prior to the interrogation of Wayne Godfrey, I told him where he was, that he was in my office on the sixth floor of the Court House. I introduced him to the men that were in the room, namely, Captain Large, Detective William Large, Lieutenant Neale from the City Detective Bu-

reau, Sergeant Conly from the City Detective Bureau, Mr. Albert, the Official Court Stenographer, and introduced myself to him as chief of the county detectives for Camden County.

I told him that on Friday night, the Friday preceding January 24, 1958, that there had been a holdup at a store located at 1731 Broadway in which the proprietor, Mr. Edward Davis, had been shot and as a result of that shooting had died a short time later in the Cooper Hospital.

I explained to him that I was going to ask him some questions as to his part in that holdup, but that before I asked him these questions that it was my duty to warn him that everything he told me must be the truth, and must be of his own free will without any threats or promises have been made to him.

After that was said to him, I asked him if he understood what I had just told him and he said that he did.

(342a) I asked him if he was willing to answer my questions and he said that he was.

Q. At the conclusion of his confession were the questions and answers read back to him?

A. At the conclusion of the confession, I asked the stenographer if he would read back all of the questions that I had asked him and all of the answers he made to my questions. Myself and the other officers left the room and left Mr. Godfrey with the stenographer in my office.

After the questions and answers were read back to him by the stenographer, I came back into the room and asked him if he had just heard the questions that I asked him and if he had just heard his answers that he made to those questions and he said that he had.

I asked him if he would acknowledge the questions he had heard as being those I asked him and the answers he made were as he made them and he said that he did.

Q. Were any threats made to Wayne Godfrey at this time?

A. No, sir, there were not.

Q. And were any promises made to him?

A. No promises made to him.

Q. Was he intimidated in any manner?

A. He was not intimidated in any manner.

Q. Were any physical acts of violence or assaults used on him?

A. No, there was no physical acts of violence or assaults used on him.

Q. What time of the day did the interrogation conclude?

A. I think it concluded just about 12:00 o'clock, Mr. Prosecutor.

MR. HEINE: You may cross-examine.

(343a) CROSS-EXAMINATION.

BY MR. FLUHARTY:

Q. Chief Dube, do you know when Wayne Godfrey was apprehended?

A. The previous day. I believe some time in the afternoon on Tuesday, the 28th.

Q. In the afternoon you say?

A. I believe so.

Q. Could you give me an approximate time?

A. I was not there, Mr. Fluharty. I know it was sometime in the afternoon. I don't know approximately what time it was.

Q. Chief Dube, do you know if from the time he was apprehended until 10:25 A. M. the following morning when

the questioning began, do you know if he was given an opportunity to sleep at all?

A. I was in and out of the Detective Bureau all that night, and I do not know where Mr. Godfrey was. He was not with me.

Q. He was not with you?

A. That is right.

Q. Did you see him in the Prosecutor's office as you went in and out during that night?

A. I was not in the Prosecutor's office that night, sir. I was in the City Detective Bureau.

Q. You do not know where Mr. Godfrey was?

A. He was around in the Detective Bureau, probably in one of the detention rooms, but I do not know where he was and I had not talked to him.

Q. You refer to a detention room.

Are there sleeping facilities in the dentention room?

(344a) A. I believe there are tables there, Mr. Fluharty. I don't know what the facilities are. I have not seen the new detention rooms.

Q. Sir, how was Wayne Godfrey dressed when the questioning began at 10:25 in the morning? Do you recall?

A. You are asking me something that happened a year ago, Mr. Fluharty. I do not recall actually how he was dressed that morning.

Q. Do you recall, sir, if he had shoes and socks on?

A. I believe he had shoes on. I would not—I am certain he was not barefooted.

Q. Do you recall, sir, if he was seated near a window?

A. I believe he was seated. My desk and the desk of Captain Large which would be in the middle of the room.

I believe Mr. Albert was sitting at Captain Large's desk taking the questions.

Q. Do you recall, sir, whether there was an open window in the room at the time of the questioning?

A. I would not recall, no, sir.

Q. Sir, can you tell us if at the time you questioned him you spoke in the same tone that you have used here today in testifying?

A. I believe so.

Q. You did not raise your voice or shout to him at all?

A. I did not have to, Mr. Fluharty.

Q. Do I take it from that that he voluntarily cooperated with you?

A. He voluntarily answered my questions as I asked them of him.

Q. He did not seem reluctant to give you the information?

A. No reluctance or hesitation that I could detect.

(345a) He told me what had happened and his participation in this crime.

MR. FLUHARTY: I have nothing further.

MR. CAGGIANO: No questions.

MR. BERTMAN: No questions.

RE-DIRECT EXAMINATION.

BY MR. HEINE:

Q. Were any threats made to Wayne Godfrey at any time before or during the confession?

A. Never during the confession or at any time that he was in my presence.

Q. At any time while Wayne Godfrey was in your presence or during the questioning, did he complain about lack of sleep?

A. No, sir.

Q. Did he ever request time to sleep?

A. No, sir.

Q. Do you know whether or not you wore your coat during the time of the interrogation?

A. Mr. Prosecutor, there were about seven or eight men in that room. It is a small office. I believe I was in my shirt sleeves.

MR. HEINE: That is all.

MR. FLUHARTY: No questions.

(346a) LT. WILLIAM NEALE, recalled.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. You have sworn to testify in the trial, haven't you?

A. Yes, sir.

Q. Lieutenant, were you present at the time that the defendant, Wayne Godfrey, was interrogated?

A. Yes, sir.

Q. Where did the interrogation take place?

A. In Chief Dube's office of the Prosecutor's office, sixth floor of the Court House.

Q. Was there anyone else present at the time?

A. Yes, sir.

Q. Who was present?

A. Chief Dube, Philip Large, Detective William Large of the Prosecutor's office, Sergeant Vincent Conley, and myself of the City Police Department, and Mr. Fred Albert, the Court Stenographer.

Q. Prior to the interrogation, was there anything said by Chief Dube to the defendant, Wayne Godfrey?

A. Yes, sir.

Q. What was said to him?

A. Chief Dube explained to him who was in the room, he identified everybody that was in the room, including himself and the Court Stenographer. He explained to him of his rights and he asked him if he would make a voluntary statement, and Wayne Godfrey made his statement.

Q. Did Wayne Godfrey indicate that he wouldn't make a voluntary statement?

(347a) A. No, sir, no hesitation whatever on his part.

Q. Then he did indicate that he would make a voluntary statement?

A. Yes, sir.

Q. At the conclusion of his confession, were you present when the questions and answers were read back to him?

A. No, I was not, sir.

Q. Were you present when Wayne Godfrey acknowledged or not the correctness of the questions asked of him and the answers given by him in response to those questions?

A. Yes, sir, I was present at that time.

Q. Did he acknowledge?

A. Yes, sir, he did, sir.

Q. That they were correct?

A. Yes, sir.

Lt. William Neale—Cross

Q. Were any threats made to Wayne Godfrey?
A. No threats whatsoever.
Q. Were any promises made to him?
A. No, sir.
Q. Was he intimidated in any manner?
A. No.
Q. Were any physical acts of violence or assault used?
A. Absolutely none.

MR. HEINE: Cross-examine.

CROSS-EXAMINATION.

BY MR. FLUHARTY:

Q. Lieutenant Neale, I believe you heard Chief Dube testify that Wayne Godfrey was apprehended sometime Tuesday afternoon, the 28th of January, 1958. Do you happen to know, sir, what time he was apprehended?

(348a) A. It was approximately 1:30 in the afternoon.

Q. Do you know where he was taken when he was first apprehended?

A. To the Detective Bureau, City Hall.

Q. Do you know if he was questioned there at all?

A. Not at that time, no sir, he was not.

Q. How long did he remain there?

A. At the Detective Division?

Q. Yes.

A. He remained in the Detective Division until he was taken to the Prosecutor's office.

Q. So that from 1:30 Tuesday afternoon until he was taken to the Prosecutor's office, he remained in the Detective Division?

A. Yes.

Q. Now, you mean then he was there all the way until the next day?

A. Yes, sir.

Q. During that time, where was he kept, sir, if you know?

A. He was in the conference room on the fifth floor, City Hall.

Q. In the conference room?

A. Yes.

Q. From 1:30 Tuesday afternoon until 10:25 or thereabouts Wednesday morning?

A. Not exactly, he was first brought into Detective Bureau, he was put in the interrogation room, which isn't the Detective Bureau proper, that is in the Bureau itself, that is apart from the conference room.

Q. How long did he remain there, sir?

A. Just a short time, until he was removed to the conference room, and then he remained in the conference room.

(349a) Q. Could you give me any approximation as to how long it was before he was removed to the conference room?

A. You mean from the interrogation room to the conference room? No, I can't say exactly how long.

Q. Then I take it that when he was once removed to the conference room he then spent, he remained there until Wednesday morning, when he was taken to the Prosecutor's?

A. He was removed from the interrogation room to the conference room until about four o'clock that same day, then he was brought back to the interrogation room for about an hour, and then removed once again to the conference room.

Q. And then remained in the conference room until 10:25 the next morning?

A. Well, to the best of my knowledge, I left there at four that morning, from then on I can't say what happened.

Q. Then you can say, with certainty, until four o'clock in the morning he remained in the conference room?

A. Yes.

Q. Was he questioned while he was in the conference room?

A. Yes, sir.

Q. And by whom, sir?

A. Well, I myself questioned him briefly.

Q. And was there anyone else?

A. He was also questioned by Detective Russell Young and Detective Thomas Scarduzio, and Detective Walter Zimalong.

Q. Who was the last gentleman?

A. Walter Zimalong.

Q. Do you recall Captain Large interrogating him at all when he was in the conference room?

(350a) A. No, I don't recall Captain Large.

Q. Now, can I take it that you don't recall, or that he was not?

A. I don't recall, he may have been, but I don't know whether he was or not.

Q. Now, from the time that he was placed in the conference room until four o'clock in the morning when you left, was he questioned continuously?

A. Until four o'clock in the morning, no sir.

Q. Tell me this, you mentioned that he was questioned by yourself, Mr. Young, Scarduzio and Zimalong, was he questioned in shifts, or did they question him all at the same time?

A. No, sir, we didn't start the process of interrogation until approximately about ten o'clock that evening, before he was interrogated.

Q. So then he was in there from approximately one-thirty, or shortly thereafter, until ten o'clock that evening before any questioning at all began.

A. That is by the detectives, yes, sir.

Q. Who would have questioned him during that period of time?

A. He was questioned before the local police by Philadelphia detectives.

Q. During that time?

A. Yes, sir, and that did not start until 8:05.

Q. Do you know, sir, if he had any opportunity to sleep while he was in the conference room from shortly after one-thirty Tuesday until four o'clock in the morning, when you left?

A. Well, he had an opportunity to sleep there if he wished.

Q. What is in the conference room, can you describe it for us?

(351a) A. Well, in the conference room, it is quite a large room, it is located right next to the Chief of Police's office, and there is a large conference table just about the size of the length of those two tables put together and I'd say just a little bit wider, and I'd say there is about eight chairs in there surrounding the table, and there is, well the physical layout, there is three windows in that room.

Q. Are those windows opened or closed?

A. You can open them.

Q. They can be opened?

A. Yes.

Q. Do you recall if they were opened or not?

A. No, those windows weren't opened.

Q. They were not?

A. No, I am sure of that.

Q. Are there any cots or any facilities that we generally think of to sleep on?

A. No, no sleeping facilities as far as cots or beds.

Q. Is there any lighting?

A. Yes, plenty of light.

Q. What type of light?

A. Overhead lighting.

Q. Any spotlights at all?

A. No, sir.

Q. No spotlights?

A. No.

Q. What does the overhead lighting consist of?

A. Fluorescent lighting.

Q. The general tubing?

A. Yes.

Q. White lights?

A. White lights. Well, they are not white lights. They are what they call the pink bulb, I believe. It sort of takes the glare off of the white.

(352a) Q. Now, from the time starting with, I believe, approximately ten o'clock when you said the questioning began until you left at four o'clock in the morning, do you recall if Godfrey complained at all about lack of sleep?

A. No, sir, he did not.

Q. Do you recall if he had shoes and socks on?

A. Shoes and socks?

Q. Yes.

A. I'm almost certain he had shoes and socks.

Q. Do you know if he was given any food between 1:30 and approximately 10:00 o'clock when the interrogation began?

A. As a matter of fact, we sent out and got them steak dinners and later on we got them hamburgers and coffee.

Because I believe Detective Zimalong was the one that went out and bought the food. Now, they were ordered, I know this. I see Mr. Godfrey is shaking his head. The steak dinners were ordered for all of these gentlemen. I can't say I saw him eating the steak dinner. I know we ordered steak dinners for all of them.

However, I know this, in my presence for, I don't know how much, coffee for Mr. Godfrey and hamburgers because he drank coffee incessantly.

Q. When the questioning began between 10:00 o'clock and 4:00 when you left, was he given any food during that time?

A. What time was that?

Q. I think you testified that the questioning began approximately ten o'clock on the evening of the 28th?

A. Yes, sir.

Q. And that you were there till about four o'clock in the morning?

A. Well, not during the entire course of the questioning. I was in the detective division until four.

(353a) Q. Can you tell us if he was questioned continuously from 10:00 to 4:00?

A. Well, no, sir, I can't say if he was questioned continuously from 10:00 to 4:00. Because I left the conference room, I'd say, about ten minutes after eleven.

Q. Then between 10:00 o'clock and ten after eleven was the questioning continuous, if you know?

A. Yes, sir.

Q. During that time was any food given to him?

A. Why, he was drinking coffee at that time. I think he had just finished a hamburger. Because we sent out several times for hamburgers and coffee. I can't say it was that moment or not.

Q. During that period, namely, from 10:00 o'clock until approximately ten after eleven, did he complain of wanting to go to sleep at all?

A. No, sir.

Q. You observed him, I assume, during that period of time. Is that right?

A. Yes, sir.

Q. Did you observe his head dropping at all?

A. Well, not in the fashion in which you are making it. He was sitting there with his face in the palm of his hands, which I was also.

Q. Do you recall if anyone, during that period of time, namely, from 10:00 o'clock until ten after eleven, banged their fist upon the table or made any unusual noise to awaken him?

A. Not during that time.

Q. Was there any time that this was done, that you recall?

A. Not to my knowledge.

Q. During the questioning, while you were present, were you, yourself, doing the interrogation or was someone else?

(354a) A. No, I spoke to him briefly.

Q. I am now referring to the period from ten o'clock until approximately ten after eleven?

A. Yes, sir.

Q. Which, I believe is stated as the time the questioning took place while you were there. Were you conducting that investigation or were various persons?

A. I was conducting the interrogation and also Detective Scarduzio and Detective Young was there at that time with me who were also asking questions.

Q. Were you questioning him intermittently?

A. Yes.

Q. First one and then the other?

A. Yes, sir.

Q. What tone of voice were you using at the time you questioned him?

A. Well, like we are talking here.

Q. Same as you have been testifying here today?

A. Yes, sir.

Q. Did you hear anyone shout at him?

A. Not at that time.

Q. Anybody make any statements that "You ought to be taken care of"?

A. No, sir.

MR. FLUHARTY: I have nothing further.

MR. BERTMAN: No questions.

MR. CAGGIANO: No questions.

MR. HEINE: That is all.

(355a) VINCENT CONLEY, recalled.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Sergeant, were you present when the defendant, Wayne Godfrey, was interrogated by Chief Dube?

A. I was.

Q. Where did that interrogation take place?

A. In Chief Dube's office.

Q. Was there anyone else present at the time?

A. Captain Large, William Large, Lieutenant Neale, myself and the court stenographer.

Q. Prior to his interrogation was there anything said to him concerning his rights?

A. Yes. Chief Dube explained all that to him.

Q. Did you or did you not hear Wayne Godfrey say that he would make a voluntary statement?

A. I heard him say he would.

Q. At the conclusion of his confession were the questions and answers read back to him?

A. At the conclusion we left the room and Fred Albert stayed in the room with him.

Q. Did you return to the room?

A. Yes, we returned to the room later.

Q. When you returned to the room did you or did you not hear Wayne Godfrey acknowledge the correctness of the questions asked of him and the answers given by him in response to those questions?

A. Yes, I did.

Q. Were any threats made to the defendant, Wayne Godfrey?

(356a) A. No, sir.

Q. Were any promises made to him?

A. No, sir.

Q. Was Wayne Godfrey intimidated in any manner?

A. No, sir.

Q. Were any physical acts of violence or assault used against him?

A. No, sir.

MR. HEINE: You may cross-examine.

CROSS-EXAMINATION.

BY MR. FLUHARTY:

Q. Sir, you heard Detective Neale just testify, I assume. He referred to Wayne being taken into custody at approximately 1:30 on Tuesday, January 28, and then being taken to the Detective Bureau where he remained in the conference room until he was then taken to the Prosecutor's office.

Did you have any connection with Wayne Godfrey during the time he was in the Detective Bureau at all?

A. No, sir.

Q. So then the first time you had any connection with him was when he was brought into the Prosecutor's office and there interrogated?

A. Outside of seeing him in the Detective Bureau.

Q. You saw him but you, yourself, did not question him. Did you hear anyone else questioning him?

A. No, sir.

Q. With reference to the time he was brought into the Prosecutor's office, that was approximately 10:25 A. M. on Wednesday morning—is that right?

(357a) A. That's right.

Q. The 29th of January, that would be the day after he was apprehended?

A. Yes, sir.

Q. Did you have a chance to observe his physical appearance?

A. Yes, sir.

Q. Do you recall if he had shoes and socks on?

A. No, I don't recall whether he had socks on. He had shoes on.

Q. He did have shoes on?

A. Yes.

Q. What was the general condition of the room in the Prosecutor's office when he was questioned?

By that I mean was it warm or was it cold?

A. It was comfortable.

Q. You would say it was comfortable?

A. That's right.

Q. So therefore it was not unreasonably cold or unreasonably warm?

A. No, sir.

Q. At the time that he was interrogated in the Prosecutor's office what was the condition of the lighting?

A. In the Prosecutor's office?

I don't recall that.

Q. Well, were any special lights brought in?

A. No, sir.

Q. Then I take it there were no spotlights or anything of that type?

A. No, sir.

Q. Were you present during the entire period of his interrogation in the Prosecutor's office?

A. Yes, sir.

(358a) Q. And Chief Dube did the questioning. Is that right?

A. That's right.

Q. Were any comments made by others during the course of the questioning by Chief Dube other than Mr. Albert who had some things to say with reference to reading questions back?

A. No, sir.

Q. No one else?

A. Chief Dube did the questioning.

Q. No one else had anything to say during the questioning?

A. Not that I recall, no, sir. I don't recall anyone.

Q. What did the other gentlemen do? How did they occupy themselves while Chief Dube was interrogating Wayne Godfrey?

A. Listening to the questions and answers.

Q. Did they sit or did they walk about?

A. They were sitting.

Q. Now, sir, I believe that it is general practice that officers of the law carry a service revolver. Did you see any of those exhibited or placed upon the desk or in sight during the questioning of Wayne Godfrey?

A. No, sir.

Q. Did the officers who were present have their coats on or off?

A. I don't recall how they were dressed.

Q. Do you recall, sir, whether the window in the room where he was interrogated was opened or closed?

A. No, I don't.

Q. During the interrogation that commenced on 10:25 of January 29, 1958, from that time until the conclusion of the first period of interrogation which, I believe, was approximately 11:35, did Wayne complain about being sleepy at all?

(359a) A. No, sir.

Q. Did he at any time doze off?

A. No, sir.

Q. Did anyone have occasion to bang their fist upon the table or to shake him at all?

A. No, sir.

Q. Was he given any coffee?

A. Not that I recall at that time.

Q. Was he given anything to eat?

A. What was that?

Q. Was he given anything to eat?

A. I don't recall him receiving anything at that time.

Q. Was he, while he was questioned, told by anyone that he was charged with a crime or advised in any way that he was a suspect?

A. Chief Dube explained that to him at the beginning of the statement.

Q. I believe the chief testified that he explained to him certain rights that he had, that what he said had to be voluntary, of his own free will and so forth and that it could be used against him. But do you recall anyone telling him that he was actually a suspect in this robbery killing?

A. No, I don't.

Q. Would you be able to tell us whether you knew if Wayne knew—do you follow that? It seems somewhat cumbersome. Perhaps I ought to rephrase that. Could you tell us whether Wayne knew ——

A. By the nature of the questions he must have known that he was being questioned about participation in that crime.

Q. Was there any discussion at all with reference to Wayne being held only as a material witness?

A. No, I don't recall anything like that.

(360a) MR. FLUHARTY: Nothing further.

MR. HEINE: That is all.

WILLIAM LARGE, previously sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Were you present when the defendant, Wayne Godfrey, was interrogated by Chief Dube?

A. I was.

Q. Where did this interrogation take place?

A. Sixth Floor of this building, in the Prosecutor's office.

Q. Was there anyone else present at the time?

A. Chief Dube, the Court Stenographer, Captain Large, Sergeant Conley, and Lieutenant Neale, as far as I can recall.

Q. Prior to this interrogation, did you hear Chief Dube say anything to him?

A. Just before it started, before the start of the interrogation, the Chief advised him of his rights, and also stated that what he would say would be without promise or threat from him.

Q. Did you hear Wayne Godfrey say that he would make a voluntary statement?

A. Yes, sir.

Q. At the conclusion of his confession, were you present when the questions and answers were read back to him?

(361a) A. I was not.

Q. Were you present when Wayne Godfrey did or did not acknowledge the correctness of the questions asked and the answers given by him in response to those questions?

A. I was.

Q. Did he acknowledge?
A. He did acknowledge his statement yes.
Q. As being correct?
A. As being correct, yes.
Q. Were any threats made to Wayne Godfrey?
A. No, sir.
Q. Were any promises made to Wayne Godfrey?
A. No, sir.
Q. Was he intimidated in any manner?
A. No, sir.
Q. Were any physical acts of violence or assault used?
A. No, sir.

MR. HEINE: You may cross-examine.

CROSS-EXAMINATION.

BY MR. FLUHARTY:

Q. Sir, you heard Lieutenant Neale testify, I assume, did you not?
A. Yes, sir.
Q. I believe you stated that Wayne Godfrey was taken into custody at about 1:30 on Tuesday afternoon, January 28th, 1958, and was kept in the conference room until such time that he was taken to the Prosecutor's office; namely, 10:25 Wednesday morning, January 29, 1958?
(362a) Now, during that period of time, while he was in the conference room, did you have any connection with him?
A. I went in and out. I was in and out of the room.
Q. Did you question him at all?
A. At that time it was not my duty to question him. I was more or less an all-around man.

Q. I take it you were a casual observor?

A. More or less.

Q. You had not questioned him at all?

A. No, sir.

Q. Did you see him from time to time?

A. Off and on, yes, I did.

Q. Did you ever notice if he slept at all?

A. I don't remember.

Q. Did you see him from time to time beginning at 1:30 Tuesday afternoon and ending at 10:25 A. M. the following morning, did you see him all that period of time?

A. I did see him during that time.

Q. Did you have to go off duty at all, sir?

A. No. Hours did not mean anything at the time.

Q. You worked all night?

A. Yes.

Q. He was in the conference room all night long until the next morning? That is, to the best of your recollection, or from what you observed?

A. I cannot answer that. No, like I said, he may have been in the detention room, the detectives' detention room before.

Q. Is the detention room different from the conference room?

A. There is a separation there. I.D. separates the two rooms.

Q. Is the detention room smaller than the conference room?

(363a) A. Yes.

Q. Can you tell us how long you saw him in the detention room?

A. I did not see him in there at all.

Q. You did not see him at all?
A. No.

MR. FLUHARTY: I have no questions.

MR. CAGGIANO: No questions.

MR. BERTMAN: No questions.

PHILIP LARGE, previously sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Captain, were you present when the defendant, Stanley Cassidy, was interrogated by Chief Dube?
A. Yes, I was, sir.
Q. Where did this interrogation take place?
A. Chief Dube's office in the Prosecutor's office of this building.
Q. Was there anyone else present at the time?
A. Yes, sir, there were.
Q. Who was present?
A. Mr. Fred Albert, Official Court Stenographer for the City of Camden, Lieutenant William Neale, City Detective Bureau, Detective Sergeant Vincent Conley of the City De-
(364a) tective Bureau, County Detective William Large, myself and Mr. Wayne Godfrey.
Q. Prior to the interrogation of Wayne Godfrey did you or did you not hear Mr. Dube say anything to him?

A. I did, sir.

Q. What was said by Chief Dube to Wayne Godfrey?

A. He gave Mr. Godfrey the usual warning that is given to all defendants when they are brought in to make a statement, to the effect that I am going to ask you some questions concerning a certain crime and before I ask these questions, I want to inform you that it must be voluntarily on your part, with the full knowledge that it can and will be used against you at a later date in Court, and so on.

Q. Did Wayne Godfrey make any answer to Chief Dube?

BY MR. HEINE:

Q. What did he say?

A. He said he understood it and that he would answer Mr. Dube's questions.

Q. At the conclusion of Wayne Godfrey's confessions were the questions and answers read back to him?

A. Mr. Albert requested us to leave the room and said that he was going to read them back and we left the room.

Q. Did you return into the room?

A. I did, sir.

Q. After you returned in the room did you or did you not hear Wayne Godfrey acknowledge the correctness of the questions asked of him and the answers given by him in response to those questions as read to him by Fred Albert?

A. Yes, I did.

Q. Were any threats made to Wayne Godfrey?

(365a) A. No, sir.

Q. Were any promises made to him?

A. No, sir.

Q. Was he intimidated in any manner?

A. No, sir.

Q. Were any physical acts of violence or assaults used?

A. No, sir.

MR. HEINE: Cross-examine.

CROSS-EXAMINATION.

BY MR. FLUHARTY:

Q. Now, sir, I assume you heard Lieutenant Neale testify with reference to the period of time while Wayne Godfrey was held in the detective bureau in the conference room, I think he said, did you hear the testimony?

A. Yes, sir.

Q. Did you have any connection with Wayne Godfrey during that period of time, namely, 1:30 Tuesday afternoon, January 28, 1958, until 10:25 A. M., January 29, 1958, did you have any connection with him then?

A. On and off, yes, sir.

Q. And what was your connection, did you interrogate him on and off?

A. We asked him some questions or I did, asked him to identify some clothes, whether they were his, and so forth.

Q. Now, sir, were you on duty all night that night?

A. Oh, yes.

Q. Can you tell us then as a fact whether he was detained from 1:30 Tuesday morning until 10:25 the follow-

(366a)

ing morning, he was detained at the Detective Bureau all that time?

A. Between the City Detective Bureau and the County Prosecutor's office.

Q. Well, I understand he wasn't taken to the County

Prosecutor's office until approximately 10:25 Wednesday morning, January 29, is that so?

A. That's correct.

Q. And the reason I am asking, Lieutenant Neale mentioned he went off duty at four o'clock and we don't know yet whether Wayne Godfrey was at the Detective Bureau continuously all that time from 1:30 Tuesday afternoon, Janusry 28, 1958, until 10:25 Wednesday morning, January 29. Now, can you tell us as a fact whether he was there all that ime?

A. Yes, sir, he was.

Q. Now, how often would you say you questioned him during that period of time?

A. I'd say two or three times in and out.

Q. Two or three, were they prolonged periods of time?

A. No, just checking different parts of his story.

Q. Different parts of his story?

A. Yes.

Q. Well now, when was his story taken from him?

A. I think when he was first arrested he was asked some questions by some members of the City Detective Bureau as to his whereabouts on Friday evening, January 24, and in the vicinity of six o'clock or similar questions of that effect.

Q. Well now, were there notes or memoranda made of what he said when he was first questioned?

A. Not to my knowledge, no, sir.

(367a) Q. Well then, where did you get these points that you wanted to check with him on?

A. From the various city detectives.

Q. They related to you what Wayne Godfrey told them when he first was apprehended, is that right?

A. He probably told me some, too, yes, sir.

Q. Pardon?

A. He probably told me some, too, sir.

Q. Do you know that Wayne Godfrey slept at all between the time he was first apprehended at 1:30 Tuesday afternoon to Wednesday morning, 10:25 the following day, do you know if he got any sleep?

A. I know he was dozing off in the conference room when I was going in and out.

Q. When you went in you did see him dozing off?

A. Yes, sir.

Q. Did you awaken him?

A. No, sir, sometimes when I had to, and sometimes when I didn't have to, I'd awaken him for some other reason.

Q. When you went in and found him asleep, how did you awaken him?

A. Just talked to him, that's all.

Q. Well, did you shake him or just bang your fist on the table?

A. No, sir.

Q. How did you do it?

A. Just spoke to him, I said he was dozing off there, whether he was fully asleep I don't know, sir.

Q. Well now, when he was taken to the Prosecutor's office approximately 10:25 A. M. Wednesday morning, January 29, 1958, did he complain he was tired?

A. No, sir.

(368a) Q. Did he doze off at all during that interrogation?

A. No, sir.

Q. Well, did you at any time ever bang your fist on the table in his presence?

A. No, sir.

Q. Did you ever make any statements to him that you ought to be taken care of or something to that effect?

A. No, sir.

Q. Did you happen to notice whether he had shoes and socks on or not?

A. Yes, sir.

Q. Did he or did he not?

A. He did, sir.

Q. Both shoes and socks?

A. I believe so, yes, sir.

Q. Did you see him eat at all? There seemed to be some doubt when Lieutenant Neale testified, as to whether or not Godfrey actually ate the food. Do you know if he did?

A. I know he did.

Q. Did you see him eat it?

A. Yes, sir.

Q. Could you tell us what he was eating?

A. I know he ate the hamburgers and coffee that I paid for.

Q. How many, sir, if you can recall?

A. We bought quite few, divided up between them; I wouldn't know, sir.

Q. Can you give me any idea what period of time. I am concerned whether he had a little food at one time or whether he had food from time to time.

A. From time to time we were sending over to get coffee (369a) and sandwiches and coffee and hamburgers, other than what Mr. Neale spoke of his regular meal.

Q. Now, did he seem generally cooperative when he was questioned, did he seem generally cooperative?

A. Well, when he was first arrested he didn't admit anything, he didn't, it took a considerable bit of running out by the City and County detectives to check his story.

Q. When was the first time he made any admissions, if you know?

A. His admission of guilt?

Q. Yes.

A. When Chief Dube examined him in the Prosecutor's office.

Q. Before that time he made no admissions at all?

A. Not to me.

Q. Well, you did testify, I believe, that you questioned him from time to time, maybe two or three times, did he emphatically deny everything when you questioned him?

A. Yes, sir.

Q. Well, are you able to attribute anything to his change of heart?

A. No, sir.

Q. Was there anything that you saw or anything that you know that was done that would have changed his feeling?

A. No, sir.

Q. Can you tell me when you questioned him just prior to him being taken to the Prosecutor's office, can you give me the approximate time when that took place?

A. I would say it would be about prior to midnight on Tuesday, the 28th, or some time early in the evening because we had to go out on the street and I know it was some time before midnight.

(370a) Q. That was the last time then that you questioned him or heard him questioned; did you hear anyone else question him after midnight?

A. No, sir.

Q. And before the time you went to the Prosecutor's office?

A. No, sir.

Q. Do you know if anyone did?

A. No, sir, not to my knowledge.

Q. You mean you don't know if anyone did or no one did, to your knowledge?

A. I did not say no one did, because I was not there all the time.

Q. To your knowledge no one did?

A. Not to my knowledge.

Q. Do you know if there were any notes or memoranda or any written statements of any kind taken from Wayne Godfrey or made by others while he was held at the Detective Bureau?

A. Not to my knowledge at that time.

Q. No shorthand reporter was brought in during the period 1:30 Tuesday afternoon, the 28th of January, until approximately 10:25, Wednesday, the 29th of January?

A. Not until Fred Albert was brought in Wednesday morning at approximately nine o'clock.

MR. FLUHARTY: I have nothing further.

MR. HEINE: That's all.

(Witness excused.)

(371a) FRED W. ALBERT, recalled.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Albert, were you present when the defendant, Wayne Godfrey, was interrogated by Chief Dube?

A. I was, sir.

Q. Where was he interrogated?

A. In Chief Dube's office in the Prosecutor's office.

Q. And was there anyone else present at the time?

A. Yes, Chief of the county detectives, Wilfred L. Dube, Lieutenant William Neale, Sergeant Vincent Conley, Captain Philip Large, Detective William Large and myself.

Q. Prior to his interrogation was anything said to Wayne Godfrey by Chief Dube?

A. Yes, sir, Chief Dube warned him of his rights.

Q. And did you or did you not hear Wayne Godfrey say that he knew what Chief Dube had warned him of, and that he was willing to make a voluntary statement?

A. I did.

Q. What did he say? He was or was not?

A. He was.

Q. Now, at the conclusion of his confession, were the questions and answers read back to him?

A. Yes, they were.

Q. Who read the questions and answers back to him?

A. I did.

Q. Did he or did he not acknowledge the correctness of the questions asked of him and the answers given by him in response to those questions?

(372a) A. He did.

Q. Were any threats made to Wayne Godfrey?

A. None whatsoever.

Q. Were any promises made to him?

A. None.

Q. Was he intimidated in any manner?

A. No, he was not.

Q. Were any physical acts of violence or assault used?

A. No, there were not.

MR. HEINE: Cross-examine.

CROSS-EXAMINATION.

BY MR. FLUHARTY:

Q. Mr. Albert, during the course of the questioning while you were present was there anything that was said off the record?

A. Not that I recall.

Q. Any direction made to you that this will be off the record, Mr. Albert?

A. No, sir.

MR. FLUHARTY: That's all, I have nothing further.

(Witness excused.)

(373a) WILFRED L. DUBE, recalled.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. I understood you to say that your first interrogation of Wayne Godfrey concluded around twelve o'clock noon time.

A. That's correct.

Q. Was he interrogated later that day again?

A. At the time there were two or three questions asked him after the acknowledgment of the confession and then again later that night at 11:15 P. M.

Q. Now, who was present when you interrogated him the second time commencing 11:15 P. M.

A. Mr. Fred Albert, the stenographer, the defendant and myself.

Q. Now, did you warn him again of any of his rights?

A. The second time I explained to him that I had taken a statement from him that morning and that at this time I wanted to ask him some questions that he had omitted in the first statement.

I at that time told him that I was asking him questions concerning the hold-up and shooting of Mr. Edward Davis of the toy store at 1731 Broadway, and I again told him that everything he told me must be the truth, of his own free will, without any threats or promises having been made, and he agreed to answer these questions.

Q. At the conclusion of his confession ——

A. At the conclusion of the second interrogation, I told him that the Court Stenographer would read back my ques-

(374a) tions and his answers, after which, I would ask him

another question, and I then left the room and Mr. Albert read back the questions and the answers.

Q. Did you return to the room?

A. Yes.

Q. Did he at anytime acknowledge the correctness of the questions asked of him and the answers given by him in response to those questions?

A. He acknowledged the questions as the questions I had asked him and the answers as the answers he made to my questions.

Q. Were any threats made to the defendant?

A. There were no threats made, no sir.

Q. By "defendant" I mean Wayne Godfrey.

A. That is correct.

Q. Were any promises made to Wayne Godfrey?

A. No promises, no threats made to him.

Q. Were any physical acts of violence or assault used against him?

A. No.

Q. Was he intimidated in any manner?

A. No, sir, he was not.

Q. Do you recall what time the second interrogation concluded?

A. Shortly after midnight, about 11:35.

Q. Now, where was Wayne Godfrey, if you know, between twelve o'clock noon, when you concluded your first interrogation and 11:15 P. M., when you commenced your second interrogation?

A. He had gone to Newark with the officers.

Q. For what purpose?

A. To locate Sylvester Johnson.

MR. HEINE: You may cross-examine.

(375a) CROSS-EXAMINATION.

BY MR. FLUHARTY:

Q. Chief, do you know if Wayne Godfrey was ever advised that he was suspected of being implicated in this matter at all?

A. He told me he was in the matter, Mr. Fluharty.

Q. Pardon?

A. He told me he was in the matter. I didn't have to tell him. He told me he was in it.

Q. But you yourself, or no one else that you know of, ever told him?

A. I told him what I was investigating, and I told him about the hold-up and the shooting, and from that point he began to tell me what he had to do with it.

MR. FLUHARTY: Nothing further.

FRED ALBERT, previously sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Albert, were you present at the time when the defendant, Wayne Godfrey, was interrogated the second time by Chief Dube, commencing at 11:15 P. M. on Wednesday, January 29, 1958?

A. I was.

(376a) Q. Who else was present?

A. Chief Dube, I and the defendant.

Q. Prior to the interrogation did you, or did you not, hear Chief Dube say anything to him concerning his rights?

A. Yes. Chief Dube warned him of his rights.

Q. Did you, or did you not hear Wayne Godfrey say that he was willing to make a voluntary statement?

A. I did.

Q. At the conclusion of the second confession were the questions and answers read back to him?

A. They were.

Q. Who read it back to him?

A. I did.

Q. Did Wayne Godfrey acknowledge or not, the correctness of the questions asked of him and the answers given by him in response to those questions?

A. He did.

Q. He did acknowledge the correctness thereof?

A. He did.

Q. Were any threats made to the defendant, Wayne Godfrey?

A. None whatever.

Q. Were any promises made to him?

A. None.

Q. Were any physical acts of violence or assault used against him?

A. None.

Q. Was he intimidated in any manner?

A. No.

MR. HEINE: You may cross-examine.

MR. FLUHARTY: No questions.

Discussion

(377a) MR. CAGGIANO: No questions.

MR. HEINE: Excuse me, what time did the second interrogation conclude?

THE WITNESS: 11:35 P. M.

MR. HEINE: That is all.

MR. FLUHARTY: May the record show that I am now having a conference with my client, Wayne Godfrey.

(Mr. Fluharty and defendant, Wayne Godfrey, are conferring.)

MR. FLUHARTY: I have nothing further.

THE COURT: No evidence is being presented on behalf of the defendant, Godfrey, as to the involuntary nature of the confession.

MR. HEINE: I propose, if the Court please, to offer the confession of Wayne Godfrey, the two confessions of Wayne Godfrey.

THE COURT: It is the Court's personal determination that the confession or confessions of the defendant, Godfrey, are voluntary.

MR. HEINE: Shall we start on the third?

MR. FLUHARTY: Could we take a short break and then start. We will stay right with it until we finish.

(378a) THE COURT: We will take a short recess.

(Recess taken.)

(After recess.)

MR. FLUHARTY: If the Court please, Your Honor has ruled. However, I would like to object to the admission in evidence of the confession of the alleged confession, of Wayne Godfrey, on the basis that it was taken after a prolonged period of interrogation from 1:30 Tuesday afternoon, January 28, 1958, until sometime after eleven o'clock, January 29, 1958, the following day.

I feel that this was not fair and that this influenced the defendant in the making of a statement to such an extent that he no longer had control of his faculties and could not properly reflect upon what he was saying.

MR. BERTMAN: If Your Honor pleases ——

THE COURT: Just a moment. I want the record to reflect that I did not rule on that application by the Prosecutor without giving the defendant an opportunity to be heard. When defendant's counsel did not rise following the motion by the Prosecutor, I assumed that he had no objection to the offer and I thereby ruled. But, since the recess counsel has reconsidered and has officially made the objection a matter of record.

I feel now that the evidence justifies the conclusion that the confession or the confessions of the defendant, Wayne Godfrey, were voluntary.

MR. BERTMAN: May I make a motion at this time, if His Honor please. As you well know, demand was made

(379a) by defense counsel to have a copy of these confessions and after having received them I have read the confessions. In reading these confessions, it is evident that these confessions contain an abundance of hearsay and that no amount of contact or continuous perusal of these confessions, or stipulation, will avail counsel anything that might be deleted to such an extent that these confessions could go into the record, or be read to the jury without doing the defendant, Sylvester Johnson irreparable harm.

If Your Honor please, I am fully aware of the ruling of the Court in the Rios case, State vs. Rios case, and cases before that, where the Courts have held that even though the confessions made contain hearsay, that the Court can correct that particular situation by making a charge to the jury to the effect that they should disregard the hearsay evidence.

If Your Honor please, I wish to point out that in most instances it is even difficult for learned attorneys and judges to distinguish what may be considered hearsay and what is not hearsay evidence, and to cast such a burden upon this jury I think is casting too heavy a burden and I feel that no matter what kind of chopping we may do to delete these confessions, that to permit the confession of Wayne Godfrey—and I make this objection too, although it perhaps may not be timely, and I am asking Your Honor to consider this objection insofar as Cassidy's confession is concerned, to be timely—that both their confessions contain so much hearsay that no amount of instruction by the Court would make it possible for the jury to delete the good from the bad, and to permit these in will not give my client, Sylvester Johnson, the opportunity to have a fair and impartial trial.

(380a) THE COURT: Mr. Bertman, I do not know why you are making your motion at this time.

I understood that we were going to proceed on the question of whether or not the confession of your client was voluntary.

MR. BERTMAN: That is true. The reason I am making, if Your Honor pleases, is because you have ruled that the Godfrey confession should be in evidence.

THE COURT: I said it was voluntary.

MR. BERTMAN: Or that it was taken voluntarily.

We can then, naturally, go a step further and say that it can be put into evidence.

I should have made the motion before Your Honor ruled on the Cassidy confession.

I asked Your Honor to consider my motion as having been made in connection with the Cassidy confession also.

I say that now that your Honor has ruled that these two confessions are voluntary, and they may be read into evidence, I say that I feel that the motion is in order at this time for the reasons I have stated.

THE COURT: There is nothing before me to pass upon right now, sir. That is why I think the motion you are making is premature.

MR. BERTMAN: Do you mean because you have not read the confession?

THE COURT: They have not even been offered yet.

MR. BERTMAN: All right, I will do it at that time, sir.

(381a) MR. HEINE: Chief Dube.

WILFRED DUBE, previously sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Chief Dube, were you present when the defendant, Sylvester Johnson, was interrogated?

A. Yes, I was.

Q. Where did the interrogation take place?

A. In my office in the Court House, the Prosecutor's office on the Sixth Floor of this building.

Q. Was there anyone else present at the time?

A. There was Sergeant Conley, Lieutenant William Neale, Detective William Large, myself and the official court stenographer.

Q. What was the stenographer's name?

A. Mr. Fred Albert.

Q. Prior to this interrogation, was anything said to the defendant, Sylvester Johnson?

A. Yes. I told him that he was in the Prosecutor's office in the Court House, on the Sixth Floor, that he was presently in my office. I introduced myself to him and told him who I was.

I introduced Lieutenant Neale, Sergeant Conley, as members of the City Detective Bureau in Camden.

I introduced Detective William Large as a County De-

tective and introduced Mr. Fred Albert as the Official Court Stenographer.

(382a) After that I told him that on Friday night, January 24th, the Friday past, that there had been a hold-up at a toy store at 1731 Broadway, in which a man by the name of Mr. Edward Davis was shot and as a result of that shooting died a short time later in the Cooper Hospital.

I told him that I wanted to ask him some questions as to what he knew of this hold-up and shooting, but before I would ask him these questions, it was my duty to warn him that everything he told me must be the truth, is of his own free will, without any threats or promises having been made to him, and knowing that anything he told me could be used against he or any other person at some future time.

I then asked if he understood everything I told him and he said he did.

I asked him would he answer my questions and he said he would, and the interrogation began.

Q. At the conclusion of this confession, were the questions and answers read back to him?

A. At the conclusion of the confession, I told him that the Court Stenographer, Mr. Albert, was going to read back all of my questions and all of his answers, and that after that I would have another question to ask him.

I then left the room, along with Detective Large, Sergeant Conley and Lieutenant Neale.

After Mr. Albert had read back the questions and answers to Mr. Johnson, I came back into the room and I asked him if he had heard the questions and answers read to him.

He said he had and I then asked him if he would acknowledge the fact that the questions read to him were as I

asked him and that the answers he made to them were as he answered my questions, and he said that they were.

(383a) Q. Were any threats made to the defendant, Sylvester Johnson?

A. No, there were none.

Q. Were any promises made to him?

A. No, there were not.

Q. Was any physical act of violence or assault used?

A. No.

Q. Was he intimidated in any manner?

A. Not in any manner, sir.

MR. HEINE: You may cross-examine.

CROSS-EXAMINATION.

BY MR. BERTMAN:

Q. Chief Dube, there were no threats or physical violence, or intimidation so far as you were concerned, was there, to this defendant, Sylvester Johnson.

A. I don't understand that, Mr. Bertman.

Q. You did not make any threats or intimidate him in any way?

A. No, sir, I did not.

Q. You do not know then what happened to this defendant before you saw him, do you?

A. I certainly don't know what happened to him when he was not in my presence.

Q. Therefore, you would not know whether there were any previous threats or intimidations made?

A. The Prosecutor asked me at the time of this interrogation whether there were any threats or hints of physical violence, and I said that there were not, and there were not.

Q. What is that?

(384a) A. There were no threats or physical violence offered to him at the time of the investigation.

Q. Insofar as you were concerned, or anyone in your presence?

A. That is correct.

Q. All right. He was picked up in Newark on the previous day about five o'clock, and what time was it when you saw him.

A. Around 4:45 in the morning, Thursday, January 30th.

Q. You do not know what was said to him, or what might have been done to him from the time he was picked up in Newark up until the time you received him, do you?

A. I can only tell what happened when he was in the room with me, sir.

Q. All right.

Was there any evidence of the use of narcotics so far as this defendant was concerned?

A. What do you mean by that, Mr. Bertman?

Q. Was there any evidence to you that, perhaps, this defendant was a user of narcotics in any way?

A. No. There was no evidence of that of any kind.

Q. Chief, during the questioning and answering period, were there intervals during the questions and answers where you would cease having the questions and answers taken by the official stenographer and have conversations with Johnson which you might say were off the record?

A. No, sir.

Q. In other words, from the moment that you began interrogating Sylvester Johnson at about 4:45 A. M., for forty-two pages, there was no break or any conversation between you and Johnson that was not contained in this confession?

A. Everything that was said in that room from the time (385a) I began the interrogation until Mr. Johnson concluded is in that record.

Q. Did you ever take Mr. Johnson out of the room?

A. No, sir.

Q. You never took him out of the room and had conversation with him?

A. No, sir.

Q. How long did the confession take?

A. I would think about an hour-and-a-half.

Q. And every word uttered, every word of your questioning and every word of Johnson's answers, were taken down?

A. That is what the stenographer was there for, sir.

Q. You then mean to say, you mean to say that there was no break or any conversations between you and Johnson?

A. Mr. Johnson narrated to me what he had done and answered my questions. Everything that was said by either he or I was reported by the stenographer.

Q. Were not there occasions when, perhaps, something might not have been clear either to the defendant in the form of your question, or sometimes, where his answers may not have been clear to you, and you discussed it with the defendant off the record?

A. I believe you will see, sir, in the record, that there were times when I did not understand what he said, and I reasked the question, and he answered it for me, and if he did not understand what I said, he asked me and I put the question to him again.

BY MR. BERTMAN:

Q. Now then, it is your testimony here that it ran about an hour and a half?

(386a) A. I would say about an hour and a half, judging by the length of the other confessions, they were all running about that time.

Q. You say here it is your testimony for one hour and a half there is absolutely no break whatsoever, that everything that was said in that room was taken down.

A. When you are taking a confession, everything is taken down and continue until it is finished.

MR. BERTMAN: I have nothing further.

RE-DIRECT EXAMINATION.

BY MR. HEINE:

Q. Chief Dube, were there any evidence that you could see on Mr. Johnson's person that he had been subjected to any acts of physical violence?

A. No, sir.

Q. Did Sylvester Johnson complain of lack of sleep?

A. He did not.

Q. Did he ever ask time to sleep?

A. He did not.

Q. Did he ever ask time to sleep?

A. He did not.

Q. Did he ever ask for a rest?

A. No, sir.

MR. HEINE: That's all.

(387a) RE-CROSS EXAMINATION.

BY MR. BERTMAN:

Q. Well, Chief Dube, you have taken probably a thousand statements or confessions, probably a lot more than that during the course of your career as a law enforcement officer. Now, do you consider it from your experience to be a fair and proper time to take confessions of an accused after he has had a complete sleepless night? Do you think that at that particular point that he is at his best to answer questions clearly and properly?

MR. HEINE: If your Honor pleases, I object to this question on several grounds, one, apparently he has been asked now for an expert opinion and I could qualify the chief as an expert in taking confessions; secondly, there is a hypothesis as to the sleepless night and ——

THE COURT: That's right, there is no proof, it is a hypothetical question, no facts to support it.

MR. HEINE: No foundation laid for it.

MR. BERTMAN: Well, assuming ——

THE COURT: There was some testimony that this fellow was in the jail and he might have had some sleep in the Newark jail.

MR. BERTMAN: He said they didn't know.

THE COURT: You are making a definite statement he did not have.

(388a) MR. BERTMAN: Let's assume I put the defendant on the stand and he said that, why could I put this witness on?

THE COURT: You could call him as your witness.

MR. BERTMAN: Then I subject him to cross-examination by the State, if your Honor pleases.

THE COURT: You have been asking a hypothetical question to qualify him as an expert.

MR. BERTMAN: I have nothing further.

(Witness excused.)

LIEUTENANT WILLIAM NEALE, recalled.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Lieutenant, were you present when defendant, Sylvester Johnson, was interrogated by Chief Dube?

A. Yes, I was.

Q. Where did that interrogation take place?

A. That interrogation took place in Chief Dube's office in the Prosecutor's office in this building on the sixth floor.

Q. Who, if anyone, was present at the time?

A. Detective William Large of the County Detectives, Sergeant Vincent Conley of the Camden Police Depart-

ment, myself, of course, Chief Dube, and the defendant and Mr. Fred Albert, the Official Court Stenographer.

(389a) Q. Now, prior to the interrogation of the defendant, Sylvester Johnson, did you or did you not hear Chief Dube warn him of his rights?

A. Yes, I did.

Q. Did you or did you not hear the defendant, Sylvester Johnson, offer to make a voluntary statement?

A. Yes.

MR. BERTMAN: I object to that, if your Honor pleases.

THE COURT: It may be leading, Mr. Prosecutor.

MR. BERTMAN: Not only that, the word "voluntary" is certainly calling for a conclusion.

THE COURT: That's right.

MR. HEINE: I will withdraw the question.

THE COURT: It is withdrawn.

MR. HEINE: And ask the answer be stricken.

BY MR. HEINE:

Q. Did you hear the defendant, Sylvester Johnson, say anything in response to Chief Dube's warning?

A. Yes, I did.

Q. What did Johnson say?

A. He stated that he was willing to make a statement.

Q. Now, were you present at the conclusion of his con-

fession when the questions and answers were read back to him?

(390a) A. No, sir, I was not.

Q. Were you present after the questions and answers were read back to him?

A. Yes, sir, I was.

Q. Did you or did you not hear Sylvester Johnson acknowledge the correctness of the questions asked of him and the answers given by him in response to those questions?

A. Yes, I did.

Q. Were any threats made to the defendant, Sylvester Johnson?

A. No.

Q. Were any promises made to him?

A. No, sir.

Q. Were any physical acts of violence or assault used against him?

A. No, sir.

Q. Was he intimidated in any manner?

A. Absolutely not.

MR. HEINE: Cross-examine.

CROSS-EXAMINATION.

BY MR. BERTMAN:

Q. When did you first see him, Lieutenant Neale?

A. I first saw him in the Prosecutor's office.

Q. That was about four-thirty or four forty-five?

A. Yes.

Q. Around that time?
A. Yes, sir.

(391a) MR. BERTMAN: Nothing further.

(Witness excused.)

SERGEANT VINCENT CONLEY, recalled.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Sergeant Conley, were you present when the defendant, Sylvester Johnson, was interrogated by Chief Dube?
A. I was.
Q. Where did the interrogation take place?
A. Chief Dube's office in the Prosecutor's office.
Q. Was there anyone else present at the time?
A. Yes.
Q. Who else was present?
A. Detective William Large, Lieutenant Neale, myself, and defendant and court stenographer, Fred Albert.
Q. Did you hear Chief Dube say anything to the defendant, Sylvester Johnson, concerning his rights prior to the interrogation?
A. Yes, I did.
Q. Did you hear the defendant, Sylvester Johnson, make a response to Chief Dube's warning?
A. Yes, I did.
Q. What did Sylvester Johnson say?

A. He said he would make a statement.

Q. Were you present at the time when the questions and answers were read back to him?

(392a) A. No.

Q. Did you re-enter the room?

A. Yes, later.

Q. Did you or did you not hear Sylvester Johnson acknowledge the correctness of the questions asked of him and the answers given by him in response to those questions?

A. Yes, I did.

Q. And did he acknowledge the correctness of those?

A. Yes, he did.

Q. Were any threats made to the defendant, Sylvester Johnson?

A. No, sir.

Q. Were any promises made to him?

A. No, sir.

Q. Were any physical acts of violence or assault used against him?

A. No, sir.

Q. Was he intimidated in any manner?

A. No, sir.

MR. HEINE: You may cross-examine.

CROSS-EXAMINATION.

BY MR. BERTMAN:

Q. You picked him up in Newark?

A. That's right.

Q. And what time was it?

A. Approximately five o'clock.

Q. That was the day before the confession?

A. That's right.

(393a) Q. Then you took him to the Newark jail?

A. That's right.

Q. And he was questioned by Detectives in Newark, wasn't he?

A. Not to my knowledge, he wasn't, the Newark City detective?

Q. Yes.

A. Not to my knowledge.

Q. Was he questioned in the Newark jail or Newark Detective Division?

A. Not to my knowledge, no, he was taken there and put in ——

Q. Did you question him when you picked him up?

A. Picked him up, I had a warrant, and told him he was accused of murder.

Q. Did you connect him with the crime with which he was charged?

A. I asked him if he did it.

Q. What did he say?

A. At that time he said no.

Q. Was that the end of your questioning, did you stop right there and then?

A. Yes, sir.

Q. You mean to say that you as an officer, detective of the City of Camden, knew that this man was charged with murder, and that the only questioning you gave this man was, "Did you do it?" and he said no, and you stopped right there and then.

A. At that time, yes.

Q. Well, let me know what else you asked him and when, how long did the interrogation take place?

A. On the way back from Newark we asked him, I asked him several questions.

(394a) Q. And there were others with you that asked him questions, too?

A. They may have.

Q. They were within your hearing, weren't they?

A. Yes.

Q. Well, did they or didn't they?

A. They may have, I don't recall what questions, there was conversation in the car.

Q. Conversation. All right. And after he was taken to the jail, in Newark, then he had a hearing, didn't he?

A. Yes.

Q. For night court?

A. Yes.

Q. What time did the hearing start at night?

A. That was the early evening, I'd say eight or nine o'clock, I am not too sure what time it was.

Q. How long did the hearing take?

A. We were there about a half hour, three-quarters of an hour.

Q. He was booked in the Newark jail?

A. Back in the Newark jail.

Q. Then you picked him up at two?

A. Approximately that time.

Q. And drove him to Camden?

A. Right.

Q. Got here around four or so?

A. Approximately four o'clock, that's right.

Q. And then you took him to the Camden City Detective Bureau?

A. Took him directly to the Prosecutor's office.

Q. Prosecutor's office?

A. That's right.

Q. Did you turn him over to Chief Dube?

(395a) A. That's right.

Q. Were you present when the questioning took place?

A. That's right.

Q. Now, you don't know whether he had been sleeping when you picked him up in Newark at five?

A. He was sitting watching television, in the apartment.

Q. Was he clothed?

A. Yes.

Q. He was dressed?

A. Yes.

MR. BERTMAN: That is all.

MR. HEINE: That's all.

(Witness excused.)

WILLIAM LARGE, previously sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Detective Large, were you present when the defendant, Sylvester Johnson, was interrogated by Chief Dube?

A. I was.

Q. Where did the interrogation take place?

A. Chief Dube's office on the Sixth Floor of the Court House.

Q. Was there anyone else present at the time?

A. Lieutenant Neale, Sergeant Conly, Chief Dube, and the Official Stenographer, Fred Albert.

(396a) Q. Prior to his interrogation, did you hear Chief Dube warn the defendant, Sylvester Johnson, of his rights?

A. Yes, I did, sir.

Q. Did you hear Sylvester Johnson make any response to his warning?

A. He answered that he understood and would make a statement.

Q. Were you present when the questions and answers were read back to Sylvester Johnson?

A. I was not.

Q. Were you present in a room when Chief Dube asked him to acknowledge the correctness of the questions and answers, or not?

A. I was.

Q. Did he, or did he not, acknowledge the correctness of the questions asked of him, and the answers given by him in response to those questions?

A. He acknowledged them and said that it was a true statement he had given.

Q. Were any threats made to the defendant, Sylvester Johnson?

A. No.

Q. Were any promises made to him?

A. No.

Q. Were any physical acts of violence or assault used?

A. No.

Q. Was he intimidated in any manner?

A. No, sir.

MR. HEINE: You may cross-examine.

(397a) CROSS-EXAMINATION.

BY MR. BERTMAN:

Q. Did you accompany the officers to Newark?
A. No, sir.

MR. BERTMAN: I have nothing further from this witness. May I ask Sergeant Conley one more question?

THE COURT: Yes.

VINCENT CONLEY, previously sworn.

CROSS-EXAMINATION.

BY MR. BERTMAN:

Q. Now, when you started talking to this defendant in Newark, you asked him whether or not he had anything to do with this. His answer was no, was it not?

A. I told him he was charged with murder and he said no, he didn't want to do it at that time.

Q. Did you then relate to him that Cassidy and Godfrey had been apprehended?

A. On the way back in the car one of the conversations we had, we told him that Cassidy and Wayne Godfrey had been picked up.

Q. Did you not relate to him that Cassidy and Godfrey had implicated him?

(398a) A. We told him that he had been named as the trigger man.

Q. And you told him that Cassidy and Godfrey had said that. Isn't that right?

A. That's right.

Q. Is it not the fact that his reply to that was that he didn't remember what had taken place, but that—I am not quite finished yet—but that anything that he would have to tell you about it would only be what Godfrey or Cassidy had told him, but not as of his own recollection? Do you understand my question?

A. Truthfully, no.

MR. HEINE: Just a moment. I want to object to this question and this whole line of questioning because the only matter that we are concerned with is the voluntariness of the confessions and not as to any prior confession or the contents of this confession.

THE COURT: That is true. These things might have transpired before. We are only concerned now with whether this confession was voluntary, not what his condition might have been at the time, or whether he committed a murder, or anything like that. It is whether any force, intimidation, promises were made to secure the confession.

MR. BERTMAN: If Your Honor please, I am well aware of that. My client feels that I should ask these questions.

THE COURT: I have sustained the objection.

MR. BERTMAN: I wanted him to understand why.

(399a) MR. HEINE: I think it is only fair to say that there will be further opportunity to make these same points.

MR. BERTMAN: I have nothing further.

FRED W. ALBERT, previously sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Albert, were you present when the defendant, Sylvester Johnson, was interrogated by Chief Dube?

A. I was.

Q. Where did the interrogation take place?

A. In the Prosecutor's Office in this building.

Q. At what time did the interrogation commence?

A. At 4:45 A. M.

Q. Was there anyone else present at the time?

A. Yes, sir.

Q. Who?

A. Chief of County Detectives, Wilfred L. Dube, Lieutenant William Neale, Sergeant Vincent Conley, Detective William Large, and I.

Q. Prior to his interrogation, was anything said to the defendant, Sylvester Johnson, by Chief Dube?

A. Yes, sir.

Q. What was said?

A. Chief Dube warned him of his rights.

Q. Did Sylvester Johnson make any answer to Chief Dube's warning?

(400a) A. Yes, he did.

Q. What answer did he make?

A. Yes, he answered yes to a question "Under those circumstances, are you willing to answer my questions" and his answer was yes.

Q. At the conclusion of his confession, were the questions and answers read back to the defendant, Sylvester Johnson?

A. They were.

Q. By whom?

A. I read them back to the defendant.

Q. Did Sylvester Johnson, or did he not, acknowledge the correctness of the questions asked of him and the answers given by him in response to those questions?

A. He did.

Q. Were any threats made to the defendant, Sylvester Johnson?

A. No, sir.

Q. Were any promises made to him?

A. No, sir.

Q. Were any physical acts of violence or assault used?

A. No, sir.

Q. Was he intimidated in any manner at all?

A. No, sir.

Q. How long did the interrogation last?

A. The interrogation lasted—I notice on the record that I did not put the conclusion time. My notes show 6:20 A. M.

MR. HEINE: You may cross-examine.

(401a) CROSS-EXAMINATION.

BY MR. BERTMAN:

Q. Mr. Albert, 6:20 A. M., that would be an hour and three-quarters then, would it not?

A. Whatever the computation is.

Q. During that hour and three-quarters ——

MR. HEINE: It is an hour and thirty-five minutes.

THE COURT: Mr. Albert says "Whatever the computation is."

Q. 4:45 to—what was it?

A. 6:20.

MR. BERTMAN: That would be twenty-five minutes less than two hours. Yes, that's right.

Q. Were there any breaks during the questions and answers, Mr. Albert?

A. Not that I recall.

Q. Mr. Albert, you are the Official Court Stenographer, are you not, for Camden County?

A. That's right.

Q. As part of your duties, you take these statements, or confessions, or whatever they might be called?

A. That is right.

Q. And you have taken hundreds of them, have you not?

A. Yes, indeed.

Q. Isn't the common practice and procedure that in taking these confessions, even in attorneys' offices, that breaks are taken during the course of the questions and answers?

(402a) MR. HEINE: Objected to, if the Court please. We are not engaged or concerned with the common practice.

MR. BERTMAN: I wanted to know if that was followed here, assuming that it is common practice.

THE COURT: I will sustain the objection to that question.

Q. Was everything that was said between Chief Dube and Johnson recorded?

A. Yes, sir.

Q. Do you mean to say that there were no off the record conversations whatsoever?

A. There were no off the record conversations whatsoever.

MR. BERTMAN: I have nothing further.

MR. HEINE: The State moves that it be determined by the Court that the confession of Sylvester Johnson was voluntary.

MR. BERTMAN: May I confer with my client for a moment?

THE COURT: Yes.

(Mr. Bertman and the defendant, Sylvester Johnson confer.)

MR. BERTMAN: If Your Honor please, there would be no useful purpose served in putting the defendant on the stand.

Discussion

(403a) THE COURT: The prosecutor has moved that I declare that the confession of Sylvester Johnson was voluntary. Do you have any motion to make?

MR. BERTMAN: I renew the same motion that I made before, that this confession, too, will have hearsay and so on. I will renew the motion at the time the offers are made to have the confessions read.

THE COURT: As to the voluntariness. Do you say that it be withheld because it was involuntary?

MR. BERTMAN: For the purpose of the record, I merely would want to show that some time elapsed between the arrest of the defendant and the actual taking of the confession and that there was no facilities provided for the defendant to rest or sleep, and for those reasons I ask that the confession be held to be involuntary.

THE COURT: Upon the evidence presented I find that the confession of Sylvester Johnson was voluntary.

I suppose now would be a good time to recess.

MR. HEINE: Yes. I have nothing further to offer at this time. I assume that tomorrow we will reintroduce all of this testimony again and proceed with the reading of the confessions

MR. BERTMAN: I thought it was our agreement that if it was going to be held that it was voluntary, that we were not going to go through this whole thing again. We are satisfied not to go through it again.

Discussion

(404a) THE COURT: Do you mean that tomorrow we may start with the actual confessions, without any testimony as to whether it was voluntary or not?

MR. CAGGIANO: We are in accord, Your Honor.

THE COURT: Do I understand, Mr. Fluharty, you are in accord with that procedure?

MR. FLUHARTY: Yes, I am, Your Honor.

MR. HEINE: All I would ask, Your Honor, is that this is the understanding of all defendants' counsel?

MR. BERTMAN: Yes.

MR. HEINE: All I would ask on behalf of Fred W. Albert, the Court give sympathetic consideration, so that he would have plenty of opportunity to rest in-between the reading of these lengthy confessions.

THE COURT: We will take our recess now until tomorrow morning at ten o'clock.

(Whereupon, the trial adjourned to Thursday, January 22, 1959, to commence at 10:00 A. M.)

* * * * * * * * *

SYLVESTER JOHNSON, sworn.

DIRECT EXAMINATION.

BY MR. KENT:

* * * * * * * * * *

THE COURT: There was an objection made to a question which you asked. I will allow you to ask the question and continue if you see fit to do so.

Q. After you were arrested in Newark, did you tell this story to the Newark police officers?

A. Yes, I did.

I told it to the Newark police officers and three detectives from Camden.

Q. What happened then?

A. I was interrogated in Newark by three Camden detectives, two Newark detectives, and first they told me they wanted me for a murder.

I told them that I did not know of any murder, and they kept questioning me and everything, and they said, "We know of the murder and we know you are involved. There was a robbery" and at the time I did continue to deny it.

So they told me, they said, "Cassidy and Godfrey and Noah Hamilton are in custody in Camden" and they said that they had statements saying that I committed a robbery.

At the time I told them, I said, "Well, I know of the murder, but there was no robbery."

(75a) I said that I did not commit a robbery, and then I went on and told them exactly what had happened.

Q. Then you were transported to Camden?

A. Later the next morning, yes.

Q. Did you sleep?

A. No, I did not.

Q. Then what did happen in Camden?

A. In Camden I was taken to the prosecutor's office.

Q. Were you interrogated?

A. I was interrogated by three officers.

Q. You gave a statement?

A. Yes, I did.

Q. Was that statement a continuous statement, or was it interrupted during the giving of that statement?

A. Interrupted several times.

Q. What was done during those interruptions?

A. During the interruptions I was fed certain statements or information that they wanted me to put in the statements.

Q. Did you tell those officers in Camden that you were "high"?

A. I told them that when I first came there and they said that they did not want to hear that, that they were not interested in it, in anything concerning narcotics; only interested in armed robbery.

Q. During your trial, did you request that you be permitted to take the stand?

A. Yes.

Q. Who did you request this of, without mentioning names?

A. My lawyer.

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CROSS-EXAMINATION.

BY MR. HEINE:

* * * * * * * * *

(82a) A. I know how they got the statement, how they got what is down in the statement.

Q. How did they get it?

A. The information that is in that statement was fed to me from Newark, from the time I was interrogated in Newark, until the time I was in Camden. Throughout the both interrogations, the whole idea of murder, armed robbery, was fed to me bit by bit. It was, "Do you remember such and such a thing happening? Do you remember doing this? Do you remember doing this"? I kept on telling them I don't know what happened because I was intoxicated off narcotics.

Q. On the next day you were not fed any narcotics, the next day after you were apprehended?

A. No.

Q. How long after the murder were you apprehended?

A. Four or five days.

Q. And you had not been fed any narcotics in those four or five days, had you?

A. I had used narcotics between that time.

Q. When you were in Newark, did you get any narcotics while you were in the Newark Police Headquarters?

A. No, I did not.

Q. Did you have any on you?

A. No.

Q. How long does it take to wear off when you get high?

A. From six to twelve hours.

Q. When is the last time that you had narcotics before you were arrested?

A. I'd say the same day, the same morning, that morning.

Q. The morning of the day you were arrested?

A. The morning I was picked up.

Q. What time were you picked up?

(83a) A. Around five in the afternoon, I think.

Q. So you last used narcotics, you say, on that morning?

A. That morning.

Q. Is that right?

A. Yes.

Q. And you were brought down to Camden the early morning of the next day?

A. Yes.

Q. Is that right?

A. Yes.

Q. So there was almost twenty-four hours since you had any narcotics; is that right?

A. That's right.

Q. Where did you get narcotics in Newark?

A. I didn't get them in Newark.

Q. Where did you get the narcotics that you used in Newark?

A. I got them on the way coming to Newark from Hamilton.

Q. What did he give you?

A. He gave me five reefers.

Q. Five what?

A. Reefers.

Q. Where did you learn the use of the word "narcotics"?

A. Where did I learn?

Q. Yes.

A. That's a word that—well, you hear it.

Q. Where do you hear it? Do you use it in the trade? Does the trade use the word "narcotics"?

A. No.

Q. Where did you hear the use of the word narcotics?

A. I heard of, like I have used that word before I ever messed with that narcotics.

(84a) Q. You have referred to marijuana as reefers, haven't you?

A. Yes.

Q. You say Noah gave you five reefers on the way up to Newark?

A. Yes.

Q. He took you up there that Saturday, right?

A. Yes.

Q. How many did you smoke on the way up?

A. We smoked, we smoked all the way up, the three of us.

Q. How many did you smoke on Sunday?

A. Must have smoked one, maybe.

Q. How many did you smoke on Monday?

A. I?

Q. I beg your pardon?

A. I don't remember exactly how many I smoked each day. I know the morning I got picked up I still had, I still had one that morning, I smoked, the morning I was picked up, I think it was Wednesday morning or Wednesday afternoon.

Q. Do you remember who took the interrogation from you in the Prosecutor's office?

A. Prosecutor's office?

Q. Yes.

A. Yes.

Q. Who?

A. Chief Dube and Vincent ——

Q. Do you know Chief Dube?

A. No.

Q. Before?

A. No.

Q. When did you learn it was Chief Dube that took the interrogation?

(85a) A. After they took me up in the Prosecutor's office.

Q. He introduced himself as Chief Dube?

A. He told me he was Chief Dube.

Q. Beg your pardon?

A. He told me that.

Q. That is the gentleman sitting next to me now?

A. That's right.

Q. Right?

A. That's right.

Q. He told you he was Chief Dube. You remember that, don't you? You remember the court stenographer being there?

A. Yes, I remember the court stenographer being there later.

Q. What's that?

A. He was in the there when I first went into the room.

Q. Do you remember who else was in there?

A. Vincent Conley.

Q. Who else?

A. One of the Large brothers.

Q. Who else?

A. I think that was all.

Q. Do you remember Lieutenant Neale, Bill Neale, being there, City Police?

A. Might have been; I don't remember.

Q. Now, do you remember—I am now referring to Page 578-A, Line 30. Do you remember Chief Dube asking you this question:

"Is this you have told me here the truth, Sylvester," and you answered, "The best I can remember."

Remember being asked that question and giving that answer?

A. No, I do not remember that.

(86a) Q. Do you remember being asked the question, "It is the truth as you can remember, is that right," and the answer, "Yes, because after the shooting I don't remember everything exactly how it happened after the shooting."

Do you remember being asked that question and giving that answer?

A. Not that exact question and answer, no.

Q. What question do you remember being asked?

A. All through the interrogation, I kept telling him I didn't remember what happened before or after the shooting until the following day, that is what I told him, I didn't remember.

Q. Do you remember being asked the question I just asked you and giving the answer; you remember that?

A. No, I do not.

Q. Remember being asked this question, "But you up until the time of the shooting remember and what you have told me is the truth," and the answer was, "Yes"?

MR. KENT: I would like to object to that question, Your Honor, because these questions in the statement were asked before the statement was read back to the defendant by the stenographer. In other statements that were taken the form was to ask him whether all statements were true after the stenographer read back the statement. This particular

statement given by Johnson, this was not asked, and it was not answered.

THE COURT: I will allow the question to be asked. He was already asked anyhow.

MR. HEINE: At the same time I would like to point out Mr. Kent is in error as I will point out in just a minute.

(87a) BY MR. HEINE:

Q. I will ask you again, do you remember being asked the question, "But you up until the time of the shooting remember what you have told me is the truth," and your answer was "Yes."

Remember that question being asked and that answer being given?

A. No, I don't remember it.

Q. Remember the question being asked, "And the best you can remember after the shoting what you have told me is the truth" and your answer is "yes."

A. No.

Q. You remember being asked the question, "And everything you have told me has been of your own free will," and your answer was "Yes."

A. No.

Q. And you remember the question, do you remember the question, "Nobody has promised you anything or threatened you in any way," and your answer was "No."

A. I don't remember that question.

Q. What's that?

A. I don't remember that question.

Q. Now, do you remember anybody else being brought into the room while you were being questioned?

A. Yes.

Q. Outside of the police officers?

A. Yes.

Q. Who?

A. Stanley Cassidy and Wayne Godfrey.

Q. Do you remember being asked this question:

"And this is the man that went into the store with you when you held up the man that shot him? Is he the man that was with you," indicating Stanley Cassidy?

(88a) A. No.

Q. And your answer was "Yes."

A. No, I do not.

Q. You don't remember that?

A. I remember what was asked me.

Q. What was that? You remember this wasn't asked but you remember what was asked. You tell us now what was asked.

A. Cassidy came in and was asked, Cassidy was asked if he knew who I was. He said yes. Afterwards, asked if I was the man that shot Davis.

Q. What's that?

A. He was asked if I was the man that shot Davis.

Q. Yes?

A. He said yes.

Q. Do you remember that everybody left the room except the court stenographer?

Do you remember that Chief Dube, Sergeant Conley, Detective Large, and evedybody left the room including Cassidy and Godfrey?

A. No.

Q. Do you remember them all leaving?

A. No, I don't.

Q. Do you remember the court stenographer reading back the entire interrogation and all of your answers?

Do you remember that?

A. I remember him reading back.

Q. And after he read everything back to you, do you remember Chief Dube came back into the room and asked you this question:

"Sylvester, you heard the court stenographer read back to you the questions I asked you and the answers you gave in answer to my questions.

(89a) "Do you now acknowledge that the questions that he read to you and the answers you made are as I asked the questions and as you answered them"?

Your answer to that was, "Yes."

Do you remember that?

A. No.

Q. You don't remember it?

A. Chief Dube and Vince Conley and the other detectives were in the room with me the whole time.

Q. Did you ever tell Chief Dube about your using narcotics?

A. When I first came in I told him. When I first came into the interrogation room.

Q. What did you say to Chief Dube?

A. When I first came in, he set me in the chair and he said, "Look, Johnson, we have been on this case a week. We are tired. We ain't going to waste a whole lot of time with you."

He said, "We have statements saying it was armed robbery. We know exactly what it is.

"We want you to sit down and tell us just it is."

So, Vince Conley says, "Johnson knows what the score is. We have been over it several times."

Q. Chief Dube told you tell exactly what it was and to tell the truth? Is that right?

A. He told me, he said, "We are not going to waste any time.

"We want you to tell things exactly how they are."

Q. Then he proceeded to question you?

A. Afterwards I told him, I said, "I don't know anything about armed robbery."

Then I told him about narcotics.

Q. What did you say about narcotics?

(90a) A. I told him that I was using narcotics at the time, and that I was high.

I told him that I don't know what happened before and after. I told him that I was working for Hamilton and Davis.

Q. You told Chief Dube that you were working for Hamilton and Davis?

A. Right there in front of Chief Dube and Vince Conley and Detective Phil Large. It was one of the Large brothers. I don't know which one it was.

Well, he told me the same thing, that he did not want to hear anything concerning narcotics. He was not going to waste any time with me.

He said that he wanted to know exactly what happened concerning the robbery.

Q. What did you tell him concerning the robbery?

A. I told him that I did not know anything about the robbery.

Q. What is that?

A. I told him that I did not know anything about the robbery, a robbery.

Q. Do you remember being asked this question.

This is on Page 559-A.

"After he," and I insert that, the "he," meant Godfrey, "After he, Godfrey, got to the house, there was you and Wayne Godfrey and Stanley there. Right?

"Answer: Yes.

"Q. Was there any discussion had about anything going on in the house?

"A. Yes. We were talking about we were broke and wanted to have some money and discussion came up about robbing somebody.

"Q. Did you decide who you were going to rob?

(91a) "A. Yes.

"Q. Who did you decide you would rob?

"A. A fellow up on Broadway.

"Q. Whereabouts on Broadway?

"A. Broadway and Ferry Avenue, I think it is."

Q. Do you remember being asked those series of questions and giving those answers?

A. Everything in the statement was said to me by Vince Conley.

He said that that was the statements that he had, and that is what had happened.

He told me over and over again that these things happened.

Q. Mr. Johnson, I want to know first of all whether or not these were the questions that were asked you and whether these were the statements that you gave.

Do you remember that?

A. I don't remember the statement. I don't remember the statement at all. He might have asked those.

Q. If you do not remember the statement, how did you remember that it was fed to you?

A. I know he fed me the whole statement. He fed it to me from the time he picked me up.

Q. Who fed it to you?

A. Vince Conley.

Q. What did he feed to you?

A. The words in the statement.

Q. Tell us what he fed to you.

A. When I was picked up in Newark, Vince Conley asked me about the murder. I told him that I did not know about it, and after I admitted I knew about the murder but not about the armed robbery.

He told me that he had statements saying that that there was an armed robbery and exactly what had happened in it.

(92a) As the interrogation went on he kept on asking me, "You know certain things that happened. You know this happened."

He said, "You know you went to the store, and you robbed the man."

He told me exactly how it happened.

He told me that when I went to Stanley's house, exactly what we talked about.

These things he told me that were all in the statement and he asked me the questions.

I don't remember what was asked, but every question he asked me, that is what he told to me.

Q. In other words, you remember everything that Conley told you?

A. I don't remember. I just said I don't remember everything he told me.

Q. However, you do remember that you told Chief Dube everything that Conley told you.

Is that right?

A. I told him only what had really happened.

Q. Did Conley tell you to tell Chief Dube and to confess on your part that you were talking about robbing a store on Broadway, when you were down to Cassidy's house?

A. He told me to tell him exactly what we talked about up in Newark.

Q. Did you tell Conley in Newark that you were talking about robbing a store while you were still at Cassidy's house?

A. I didn't tell him anything about a robbery. I didn't know anything about a robbery. I merely told him about the drugs.

Q. Do you remember having a gun that day?

(93a) A. No.

Q. How do you know about murder?

A. I was told that the next day.

Q. Didn't I just understand you to say that you told Conley that you knew about murder, but you didn't know about armed robbery?

A. That's right.

Q. What did you know about murder?

MR. KENT: May it please the court, I object. The defendant has testified that the next day he was told about this murder.

THE COURT: I will allow these questions.

Q. What did you know about murder?

A. Like I told you, I was told the next day.

Q. Who told you the next day?

A. Cassidy and Godfrey.

Q. Did they also tell you how it happened?

A. Yes.

Q. How did they tell you it happened?

A. Told me that Stanley and I went to Davis' store and I asked for my money.

Q. No, I am asking you to tell us what Cassidy and Godfrey told you, how it happened.

A. That's what I am telling you.

Q. What is it?

A. That's what I am telling you now.

Q. What is that?

A. He came on the corner and told me that Stanley and I ——

Q. Who told you? Who is "he"?

(94a) A. Stanley.

Q. Stanley told you what?

A. That him and I went into Davis' store.

Q. Yes?

A. And I asked him for the money that I had coming for delivering the package for him. And, he said that Noah Hamilton had the money, and Davis and I had an argument.

Q. Yes? Cassidy told you that?

A. Yes.

Q. Did Cassidy tell you that you were in the Davis store before you shot him, and that you left your fingerprints on the truck?

A. He told me that Davis threw me out of the store the first time.

Q. He threw you out of the store the first time?

A. Yes, after he told me Hamilton owed me the money.

Q. Who was in the store with you the first time?

A. Cassidy said him and I went in the store.

Q. The first time?

A. Yes.

Q. Don't you remember?

A. No, I don't.

Q. After he threw you out, what happened then?

A. He said I went back in the store again.

Q. Who said?

A. Stanley.

Q. Cassidy said that you went back in the store?

A. Yes.

Q. What did you go back in the store the second time for?

A. He said I went there to ask him for my money again, the same as the first time.

Q. Why did Davis throw you out the first time?

A. I imagine I was abusive. I was intoxicated. I wanted (95a) money. I thought he was beating me out of my money, either him or Hamilton. Either him or Hamilton was suppose to pay me.

Q. Do you remember leaving your fingerprints on this truck?

A. No, I don't.

Q. You do not deny that the fingerprints were on the truck, do you?

A. I don't deny that.

Q. What is that?

A. I don't deny it.

Q. You never got money from Davis before, did you?

A. No, I didn't.

Q. Why did you go to Davis' store for money?

A. Because Hamilton had told me to go to Davis' store for the money.

Q. Up until then you say that Hamilton paid you the money?

A. That's right.

Q. Did you ever see the packages that Hamilton made up for you to deliver?

A. Inside of them?

Q. Yes.

A. No.

Q. How did you know what they were?

(No response.)

Q. Are you guessing?

A. No, I am not.

Q. How do you know what was inside the package if you never saw it?

A. Hamilton told me what they was.

(96a) Q. What is that?

A. Hamilton told me.

Q. He told you?

A. Yes.

Q. But you never saw what was inside?

A. No.

Q. When did he tell you what was inside?

A. When he came and asked me if I would deliver the packages.

Q. Did you ever collect any money for Hamilton?

A. No, I didn't.

Q. How many nembutols did you take the morning of the murder?

A. That afternoon?

Q. Yes.

A. Three.

Q. Three?

A. Yes.

Q. You say you took them in the afternoon?

A. Yes.

Q. About what time in the afternoon?

A. Somewheres between the time of twelve-thirty and four-thirty or five.

Q. Did you take three at one time, or did you take one at a time?

A. I took one at a time.

Q. How long between pills?

A. I couldn't say exactly how long between.

Q. What was that?

A. I couldn't say exactly how long between.

Q. Did you take any that morning? Did you take any nembutols in the morning?

A. No, I didn't.

(97a) Q. When did you tell your attorney this story about delivering for Hamilton and going down to Davis' store for money?

A. I told my attorney as soon as he came in to see me.

Q. When was that?

A. About a couple of days or a week after I was arrested.

Q. How many times did you tell it to him?

A. Well, I only had to tell it to him one time. We discussed it since then.

Q. You discussed it since then, with whom?

A. My lawyer.

Q. Which lawyer?

A. Mr. Bertman.

Q. When did you discuss it since then?

A. He came up to the County to see me.

Q. What was that?

A. He had come to the County to see me.

Q. When is the last time you saw Mr. Berman?

A. I seen Mr. Bertman in the death house two or three weeks after I had been there.

Q. Have you seen him since?

A. I haven't seen him since.

Q. Before that, when was the last time you saw him?

A. The last time I saw him before that was in the jury room.

Q. At the trial?

A. Yes, at the trial.

Q. Did you sign any papers for your lawyer concerning your testifying at your trial?

A. Yes.

Q. How did that come about?

A. I think it was the day before you rested your case. (98a) He asked me if I still wanted to take the stand. I told him yes.

So, he told me if I took the stand that, first he told me if I took the stand, that he would walk out on me, that he wouldn't represent me anymore.

I said, well, I said, "I want to take the stand because I feel that's the only way I can keep from getting the death penalty, by taking the stand myself," and he said he didn't want to take the responsibility of putting me on there.

He asked me what I would say. I said I would tell them exactly what happened. I told him also I wanted to tell him about the statements and how they was gotten.

Q. Go on and tell us. When he said that, you said that you wanted to take the stand, he was going to stop representing you—is that what you say?

A. That's what he said at first.

Q. Then what?

A. Afterwards I told him why I wanted to take the stand, what I wanted to do. He gave me a slip of paper that said he would not accept the responsibility if I took the stand, and I signed the paper. I still wasn't permitted to take the stand.

Q. Was your mother present at the time?

A. At the time I signed?

Q. The paper, yes.

A. She was in the courtroom. I signed the papers right at the table, counsel table.

Q. Did any officer beat you up?

A. Yes, I was hit in Newark.

Q. Hit in Newark?

A. Yes, several times.

Q. You were not asked to give a statement when you were in Newark, were you?

(99a) A. I was merely asked in Newark to admit that I committed armed robbery.

Q. Did Chief Dube beat you up?

A. Chief Dube?

Q. Yes.

A. No.

Q. Did any other detective beat you up while you were in Chief Dube's office?

A. Not in his office.

Q. What is that?

A. Not in his office.

BY MR. HEINE:

Q. Where, did anybody beat you up in any other place?

A. In Newark, and on the way coming to Camden.

Q. While you were up in Newark you deny, however, that you were involved in a murder, is that right?

A. That's right.

Q. Is that right?

* * * * * * * * *

STANLEY CASSIDY, sworn.

DIRECT EXAMINATION.

* * * * * * * * *

BY MR. KENT:

Q. Where did you obtain your drugs?

(305a) A. Well, I obtained my drugs from Noah Hamilton and another fellow that I knew, I met over in Philly, and I used to get some from him, also.

Q. Now, in a statement that you made to the police, the subject of a gun came up. Did you have a gun with you that day in your possession?

A. No, I didn't.

Q. Why did you make this statement; why did you give this to the police in your statement?

A. I was questioned when I was picked up about armed robbery, and I tried to tell them that it was no armed robbery, and the officers, they kept saying that it was an armed robbery, because they knew that we went there to rob the man, because Hamilton had told them that. And, I said, "Well, I don't know anything about any robbery."

So, when I first got picked up, I was picked up by Officer Jones, Officer Sunkett and Large's brother, Phil Large, and a couple of other officers; so, they took me upstairs into the interrogating room and first thing they started, asked me where I had been all day and I told them that I had been around, and they asked me the things that I had done.

So, they asked me did I use drugs, so at first I denied that I used drugs, so they kept on questioning me and question-

ing me, and everything, and so I finally admitted that I do use drugs.

So, they, during this time, there was an officer sitting at the desk. I was sitting between two desks, and he was taking all these things down on a yellow piece of paper, everything that I said, and he asked me who did I get my drugs from. I told him from a fellow over town. And, so they kept on asking me different things about what did I, how did I come about using drugs, and things, and how often did I use it; what I had done today and the day before, and a lot of other questions.

(306a) So, I was sitting there, so Phil Large, he jumped up, he said, "I don't want to hear that there."

He said, "You know what I want from you."

He said, "I want to know about this robbery."

I said, I tried to explain to him that I knew nothing about no robbery. So, he kept on, got riled out and everything, threw a telephone book at me, and I blocked it with my hand. He was angry because he said I wasn't cooperating with him the way he wanted me to. He said, because I knew what he wanted, because he already had a statement saying that I went to rob Mr. Davis.

So I kept on tell him I didn't go to rob Mr. Davis out of anything. I went to the store with Sylvester to see about collecting a debt.

Q. You gave three statements to the police. Is that correct?

A. I don't—I tell you, when I was locked up, I had been using drugs ever since the incident happened, and I had been using them pretty heavy. I kept on using it.

Q. Do you remember giving these statements to the police?

A. I remember a lot of questions being asked of me.

Q. Do you remember if when you gave these statements to the police this was a continuing statement? I am going to define the words "continuing statement".

The way I am using it in this question: They start the statement, question, answer, question and answer, without any interruption.

Do you remember if the statement you gave to the police was a continuous statement?

A. When I first was locked up there was questions being asked of me from everyone in the room.

Q. I am talking about the statement that was taken down by the stenographer.

(307a) Do you remember?

A. Yes, I remember.

Chief Dube asked me, was asking me questions. So at the time I wasn't in too shape to talk too good.

So he said, "All you got to do is say yes or no to what I am saying," and I told him I would do the best that I can.

So he asked me a few questions about robbery, and I told him, I said, "Well, I don't know anything about robbery."

So he say, "There's no use of you trying to get away from it, kid. We know that you went there to rob him. All you got to do is just go ahead and cooperate with me."

He was asking me questions and the stenographer would interrupt, and Chief Dube got angry with him a couple of times and said, "Well, let me ask these questions, will you?"

So he kept on asking me questions and things, and lot of times I told him that that wasn't right.

So he say, "Well, that's the way that I figured how it is. All you got to do is answer because you can't talk now."

He said, "In the state of mind that you are in."

THE COURT: May we have answers to these questions without this long rambling, Mr. Kent? He has answered the question three times, if he has answered it at all. Just answer the questions and do not keep repeating.

Ask the next question.

Q. Have you ever been convicted of crime?

A. No, I haven't.

Q. Have you ever been questioned by the police before?

A. No, I haven't.

Q. This was strange and new to you?

A. That's right.

(308a) Q. Did you tell your lawyer, after you had retained one, about this narcotic use?

A. Yes, I did.

Q. Did you plan to rob this place when you entered it that day?

A. No.

Q. Do you, of your own knowledge know whether Johnson went in there with you to rob this place?

A. He went in there to collect the debt, not to rob the man.

Q. Do you, of your own knowledge, know whether Godfrey drove you to this place for the purpose of having you to go in there and rob?

A. He drove us there. We asked him to take us up there because Sylvester wasn't in condition to walk.

Q. When you were in the store the first time did Johnson finger a truck?

A. Yes.

At first when they was talking, he was standing by this shelf. They was talking and he was looking at the truck. He mentioned to me, he said, "How would you think Mark

would like this," speaking of his little boy. I said he would really like that. It was a cement mixing truck he was looking at.

Q. This was the first time you went into the place?

A. That's right.

Q. One last question:

What did Johnson tell you after you had told him of his activities during the robbery on Saturday? What did Johnson ask you?

MR. HEINE: I object to what was asked of this witness.

(309a) THE COURT: I will sustain the objection to that question.

MR. KENT: That is all.

MR. HEINE: If Your Honor please, I have a brief rebuttal witness who is scheduled to enter a hospital this afternoon at 2:30 to undergo some examination. I at this time would like the Court's permission to defer the cross-examination so that I can accommodate this witness and get him out as quickly as possible.

MR. KENT: I have no objection.

THE COURT: There is no objection. The witness will step down.

(The witness is excused.)

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(Commencing 315a-5.)

STANLEY CASSIDY, recalled.

CROSS-EXAMINATION.

BY MR. HEINE:

Q. Cassidy, on your direct examination you stated that you didn't have the gun when you went into Davis' store?

A. That's right.

Q. You remember in your confession that you did state you did have a gun?

A. I remember when I made my first confession I told Chief Dube that I didn't have the gun and the Prosecutor came and got me and asked me did I have a gun at home at all.

I said no at first because the gun did not belong to me.

He said, "Well, look, if you have a gun home, all we want to do is check it, see if it has been fired."

He said, "We won't use this as evidence against you if it hasn't been fired."

Q. Who said this?

A. The Prosecutor.

Q. The Prosecutor?

A. That's right.

Q. You mean Prosecutor Cohen?

A. Yes.

Q. What did Prosecutor Cohen say?

A. He said that, "We know that you had a gun."

I said I didn't have a gun with me at all.

Q. At first you denied that you had a gun?

A. That's right.

Q. And it was only after the Prosecutor's office learned (316a) that you had a gun that you finally admitted that you did have a gun?

A. First they asked me did I have a gun with me.

Q. You got this gun from Brimm, didn't you?

A. Yes.

Q. Why did you get the gun from Brimm?

A. Because Brimm asked me before if I would hold the gun for him.

Q. When did you get the gun from Brimm?

A. I don't know. Maybe about earlier in the week.

Q. Wasn't it a day before or two days before the robbery?

A. I don't believe so.

Q. Well, the murder took place on Friday. What day of the week do you say you got the gun?

A. Early in the week some time.

Q. Now, you say that you went down to the Davis store with Johnson in order to assist Johnson to collect a debt?

A. I went down.

Q. Is that what you say?

A. I went down with Johnson and Godfrey, not Noah.

Q. I didn't mention Noah.

To assist Johnson to collect a debt?

A. That's right.

Q. Did you know Davis?

A. No, I didn't.

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EXCERPTS FROM OPENING STATEMENTS.

January 16, 1959.
Camden, New Jersey.

* * * * * * * * * *

MR. BERTMAN: * * *

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(Commencing 794-12.)

I have made up my mind to one thing, I am not going to try to fool you, members of the jury. I am not going to put forth any sham defense. Because if I do, I feel I am going to harm my client. Because I feel that you members of the jury would be able to see through it at once. I intend to listen to these facts as presented by the State as to how this alleged crime took place. At the close of the State's case it is my intention to present the defense to this case as I would, naturally, in any other case, but certainly in a case which is a capital (795) case, with the truth, and I feel confident that, members of the jury, when you have heard all the evidence in this case, whatever your verdict may be, whatever your verdict may be, that the verdict that you give will be given after you consider all the facts and after

you consider all the mitigating and extenuating circumstances and I feel certain that that verdict will be given without any partiality or bias.

That is what I ask of you members of the jury, to give a true and honest verdict in accordance with the facts of this case.

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MR. CAGGIANO: * * *

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(Commencing 797-8.)

As carefully as you listen, that is how carefully I shall listen. For I too am concerned with the facts and with the truth, as you are. You too will listen to all the facts and will consider and determine that they all be true. If something is not true, we do not want it. If something is not factual, we do not want it, whether it be for the good of the defendants, whether it be bad for the defendants, in favor or against the State. All we do want are the truthful facts, that which happened. For then, in that manner, we can determine how to close our case to you and you in turn deliberate and determine a fair verdict.

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SUMMATION OF MR. HEINE.

MR. HEINE: May it please the Court, and with your permission, ladies and gentlemen of the jury, the case, as was indicated to you by the Court, has now concluded. All the evidence is in. There will be no further testimony or proofs. The only part of the trial that remains is the argument, the summation by the attorneys and the charge of the Court. Then the matter will be left to you.

This trial has, from our side of the table (1686) and from the side of your box, for most of you, has consumed just about two weeks. The actual trial, commencing with the introduction of testimony, began just a week ago today, last Friday, I believe.

I think that you are entitled to the thanks, not only of myself on behalf of the State, but on behalf of all attorneys involved in this case, attorneys for the defendants, including the Court. I offer to you our deepest thanks and appreciation. You have been most attentive and this has necessitated a sacrifice on your part.

I think that I indicated last week in my opening remarks that we appreciate and are fully aware of the fact that you have been taken away from your businesses and your occupations, your families and your homes. This is not easy. The sacrifice that you have made was made not only on your own behalf, but on behalf of the entire community, the entire State. You have made a real contribution to the administration of justice.

(1687) The jury system, under our system of law, plays an extremely important part, as you will hear during the course of the summations and from the charge of the Court.

You will learn that you are the sole judges of the fact and the facts are extremely important in this case. You may, from time to time, have learned, or have heard of arguments and the like, but these arguments are on the law, are based upon facts, and these facts have to be established, or they have to be agreed upon.

I don't know whether any of you are engineers, or architects, or scientific men, professional men. If you are, you must know the facts upon which to base your later conclusions, from which you may draw inferences, and these facts are established by you. You find them. You make the determinations. You make those determinations in the form of your verdict.

For your services, for your sacrifice, we are extremely grateful. I hope that other good citizens of the community will draw a lesson from your efforts and will make themselves ready and available to serve this community, (1688) not only in this field, but in other fields that good citizenship calls upon the citizens to play. It is only by this spirit of willingness to participate that makes an American community the live and thriving community that it really is.

Perhaps this is not the way it is handled in other countries, in other lands, or in other civilizations. There are places where they don't have juries, that the Judges decide the law and the facts. This system may be argued for good or for bad, but our system, drawn from the common law, drawn from the mother country, England, has recognized that the jury system is, after all these years, the best system. (1689) We don't look for any change. At least not in this State, not in this country.

Now, the purpose of the opening I explained to you a week ago was to outline, preliminarily sketch for you, if you will, what the expected theories of the State and the

defendants might be. I on behalf of the State was outlining to you what our theory was of the case, what facts we intended to prove, only the outline. So that when the witnesses themselves spoke and the silent pieces of evidence were introduced indicates, you would be able to follow it. This was the pattern, so to speak.

The purpose of this opening that I am making now is to outline the facts which I now say most respectfully we have proven, to aid, to assist you in reaching your own determinations.

At the very outset, so there will be no question about it from here on in, and this will undoubtedly be said time and time again, and this is true, and should never be overlooked, and if it is repeated it is only done for the purpose of emphasis, not for any other purpose, that you are (1690) the sole judges of the facts. I don't want you to take my word for the fact, or what I say we proved, or what any other lawyers say they proved or didn't prove, or even, I say this most respectfully to the Court, what the Court said was the fact, if that statement, if my statement or the Court's statement, should differ from your own recollection. Do I make myself clear? If I say a fact was established and you do not recollect it was established and your recollection is not refreshed or you have a different idea about it, or even this is said to you by the Court, your recollection prevails. What you believe and what you remember shall guide you in your determination.

I say this most respectfully to the Court and I am sure the Court is aware of the fact that he is the sole judge of the law, we will take his word for the law, but we take your word for the facts.

Let me refresh your recollection to a week ago, if you will. Last Friday I stood about in the same position in out-

lining the State's case to tell you that the State had three points, there were three points to the State's theory and facts of the (1691) case.

What were those facts?

I am sure that you heard it time and time again, your recollection must be very clear, but only as an aid to refresh your recollection I said that we would prove that these three defendants, Wayne Godfrey, Stanley Cassidy and Sylvester Johnson, conspired to commit a robbery at the Davis store, at Edward Davis' store, the toy store, at 1731 Broadway, near Broadway and Ferry Avenue; that they entered into a conspiracy to commit a robbery; that they embarked on that conspiracy or pursuant to that agreement, and attempted to commit a robbery, and during the course—the third point was—that during the course of this attempted robbery, a death ensued.

These three elements I said to you and I will say again and again and again, make up a clear case of murder in the first degree. These were the three points that I said we would prove.

Let me take them up, if you will, in the inverse order, because I think proving the last point first can be quickly disposed of and leave us (1692) a little more time to discuss the other two points, although I say to you I haven't the slightest hesitation that the proof on the other two points, namely, the conspiracy and the attempted robbery, are just as clear as the fact that Edward Davis died as a result of the gunshot wounds.

However, let me refresh your recollection, it's been so long ago, a couple days ago, and there has been much testimony; testimony was developed so fast and so rapidly that sometimes it scared me that it was going in so fast and so clearly.

Is there any doubt that Edward J. Davis was discovered on the pavement in front of his store at 1731 Broadway bleeding profusely from the groin, from the face, and from the mouth? At first there seemed to be some question about it, there seemed to be some resistance as to whether the blood, and I don't say this, I don't say this to arouse any passion, I say these are the facts and I can't escape these facts and you dare not escape these facts.

(1693) You will have ample opportunity to examine these photographs yourselves when you retire to your room to deliberate, but the red stains that appear on these pavements, in the photographs like these, and in the photographs like these in front of his store, were established to be blood stains.

Do we need to say anymore?

Here we have the clothing of Edward Davis. The shirt that he wore. I shudder to hold them myself. They send a cold chill up my back and my spine, but you will have the opportunity to examine these dead, non-living pieces of evidence that speak so loudly for themselves, as to whether Edward Davis was bleeding profusely or not.

He was found, or, at least, the police were notified at 6:10 P. M., almost immediately, when his nextdoor neighbor, Kolsun, if you remember, discovered him first, dashed and called the police.

The police received the 'phone call at 6:10 P. M. Within minutes the ambulance ar- (1694) rived and Davis was rushed to the hospital.

When he arrived at the hospital, and, I believe, the hospital records say that he arrived at 6:18 P. M., so that that would be within eight minutes, at least, from the time that the police received the first call on the 'phone and sent out their broadcast, their radio broadcast. That would have

been eight minutes. The police arrived and had taken Edward Davis to the hospital because the hospital records indicate that he arrived there at 6:18, within eight minutes.

He was rushed into the emergency treatment room. He was found to have had seven wounds.

They were wounds either of entrance or exit, and that was explained to you, if you will recall, by Dr. Riegert, that the wound of entrance is where a bullet enters and the wound of exit is where a bullet leaves.

This is so clear it speaks for itself. The language is quite simple.

One bullet, Dr. Riegert said, entered around the left groin and exited underneath (1695) the back, opposite, I think, the fourth rib, or in that vicinity.

In entering his body and leaving his body it had pierced the abdominal wall.

It had pierced the liver, and this is what caused Edward Davis to bleed from the groin.

In addition to that, he was horribly shot about his face, as you will recall, and you will see these pictures themselves. You will have the opportunity to examine the pictures that were taken at the time the autopsy was performed, while the coroner was there, and they will show you how he still splashed with blood, where these bullets entered his face and his nose and his mouth, and even the bullet that was shot into his neck and that was extricated by the coroner.

Edward Davis ceased, passed way, at 6:55 P. M. Cause of death, loss of blood, caused by gunshot wounds.

Edward Davis lost his life as a result of gunshot wounds.

More about that later.

(1696) But I think this at least concludes that the State proved that a death occurred, an unlawful death occurred.

Up until this point I make no mention at what time or who was there to have caused the death. But let me get back to that and see whether this isn't clearly tied together.

Let me talk about the first point now: The conspiracy. Do you remember that I said to you last week, and I think I mentioned it a few minutes ago, a conspiracy is an agreement between two or more persons to commit an unlawful act or to do a lawful act in an unlawful manner. I submit that I told you last week, and I say again today, that the conspiracy in this case was to commit an unlawful act.

What are the facts about a conspiracy? I think I also defined for you a conspiracy last week to be sort of a partnership in crime. Now, in an agreement between two or more persons or articles of partnership in crime are never reduced to writing. You (1697) know, when you and I talk about drawing an agreement and entering into an agreement, we may go to an attorney's office and tell him what our problem is and he prepares an agreement for you or you prepare it yourself, and if you have a partnership and you want a partnership agreement, you, likewise, either go to an attorney and have him prepare it for you or you prepare it for yourself and you file it some place, file it in the County Clerk's office and everyone gets a copy of it.

When we talk about an agreement to commit a crime, I don't know of the rare case that this would be reduced to writing. This they have too much sense for. Their subconscious mind says never to put it in writing. So we cannot produce the agreement. We cannot produce the written agreement. What we will produce for you is the oral agreement and a clear understanding and, this, I think, makes simple sense.

What did they do? The Court will charge you that to establish this conspiracy you not only have a right to con-

sider the facts and what the people did, but you also have a right to infer (1698) certain things and draw inferences from them. But let us see what the admitted facts are. Godfrey planned this hold-up at least six to eight weeks before it actually took place. How do we know that? His buddy told us, his friend of at least 12 years standing. Noah Hamilton, by name, testified, without contradiction, that Godfrey told him or asked him whether he wanted to make some easy money or make some money six to eight weeks ago. How were you to make the money? Holdup. Where? Broadway and Ferry Avenue.

How does Godfrey know about Broadway and Ferry Avenue? He was doing business with a TV store across the street. There he had bought this TV set on time and had gone down there to make his payments. So he had plenty of opportunity to see the Davis store across the street. And at this point, this point, because I think I failed to tell you earlier, there may have been pieces of evidence introduced out of routine, out of date, but this is one of the things that occurs in a trial. But I think you will agree with me that when we got through, all of these pieces of (1699) the jigsaw puzzle fell so clearly into its own place, so that when we were through we had a clear picture of what transpired just as clear as that picture is of Broadway and Ferry Avenue.

Godfrey, six to eight weeks before January 24, tried to get Noah Hamilton to join him to hold up the store at Broadway and Ferry Avenue. Noah, his friend, rejected the idea, wouldn't have any part of it.

Godfrey did not give up, this slippery ring leader, this finger man and trigger man, in the parlance of the underworld. And I learned most of these parlances, I think, from the TV and the radio, the finger man is the man that says,

"This is the place." He puts the finger on it. That is how he gets his name. He becomes the finger man. He puts the finger on Edward Davis' toy store.

He was not successful at getting Noah. So he went out to look for other accomplices. Apparently he obtained the consent of Cassidy to join this illicit crime. Is there any question about this? Let us see. Cassidy—and this must (1700) have happened several days before Friday, because Cassidy went out to his friend, Brimm, and borrowed the automatic. This he borrowed from Brimm and keeps it home. The night before—because in a robbery, in an armed robbery, you need guns. The night before Godfrey goes to his friend, Walker, and borrows this gun. There is no question about that, the night before, on Thursday, several days before they had this gun. Both guns wind up in Cassidy's possession. He keeps them. He keeps the arsenal. Godfrey gave him this gun on Thursday night to keep.

Now, there is one very significant thing about this: When Godfrey borrows the gun from Walker, he tells Walker already on Thursday night, "I will return it to you Friday night." And this is an important fact. Because it establishes that Walker already knew that the job was to be pulled off on Friday night—or, Godfrey already knew that the job was to be pulled off that Friday night.

(1701) It is a matter of fact that Godfrey returned the gun to Walker Friday night after the job.

Once more, pursuant to their understanding, they met at Cassidy's house on Friday afternoon around five o'clock. Who meets there? Cassidy and Johnson arrive first. Do you believe that Johnson just dropped in by chance on Cassidy? I don't. He had been there some time. What were they talking about? I don't know. You don't know, we didn't hear. I can guess what they talked about, be-

cause as soon as Godfrey arrived with the car, they started to talk about a hold-up.

Now, nobody says, "I didn't know anything about it, what is this all about?" Later Cassidy says, "What are you talking to me about a hold-up, I don't know what you are talking about, boy, go away."

Johnson doesn't disclaim any interest in this thing. He is part of this thing, he joins.

(1702) Is this the first time they talked about it? I don't believe so. I don't believe you believe so, because they decide then to hold-up the store at Broadway and Ferry Avenue.

Now, they need an arsenal and Cassidy produces both guns, the gun that Godfrey gave him and the gun he borrowed from Brimm, and they agree to proceed to hold-up the toy store.

Godfrey, the slick one, he's got the car, the 1957 two-tone Buick, he is going to drive the car and stay on the outside and operate the get-away car, because, mind you, ladies and gentlemen, that the get-away is an important part of the whole crime, because you haven't done a thing until you get away. This is how an important part that Godfrey is in this.

Johnson and Cassidy, they agree to be the strongarm men, they are going to be the men that are going to enter the store, they are going to be the killers, and they (1703) proceed, according to plans.

They get in the car, they drive down Broadway, they passed the store, they looked in, this was to be an easy job, Davis was supposed to be an old man, he was always supposed to be alone, they look in, Davis is alone, they pull around the corner and park the car by the garages in back of the church on Jasper Street. Johnson and Cassidy then

go into the Davis store to look around. What do the gunmen say, they were going to case the joint.

I hope you will forgive me for using the parlance of the underworld.

They go in, they appear to be innocent shoppers, they look over the store and then they withdraw. They walk out of the store and come back to the car.

Now, no one can deny, no one can deny that the three of them were in Godfrey's car after Johnson and Cassidy left the Davis store, they went back to the car. What did they talk about there? I don't remember (1704) who said it, but Johnson was concerned that he left his fingerprint on this toy truck. Why should that bother him? If he didn't have robbery in his mind, what difference did it make to you if you left your fingerprint on the truck? You and I have shopped in many stores and handled many articles, and not having robbery in our heart, we never worried about going back to kill the man in order to remove our fingerprint. This is normal.

No, they decided whether it was Cassidy, or whether it was Johnson, or both of them, including Godfrey, to go back and knock off the joint as they said. So, if they didn't have a conspiracy in Cassidy's house, then they had a conspiracy in Godfrey's car on Jasper Street. There they agreed to rob the Davis store. So, they further conspired to go in, as they originally agreed.

What were they supposed to do the second time? Cassidy was to go in first, (1705) draw Davis to the rear of this store, distract his attention, and after he got Davis toward the center of the store, Johnson was to enter and hold him up.

(1706) Well, Cassidy takes his part. He enters the store and draws Davis toward the rear.

Johnson follows him in. Now they have Davis in between the two of them.

Johnson says to him, "This is a stick-up."

He must have had this gun in his hand to do something with it when he said, "This is a stick-up," because he immediately starts to fire at Davis, starts to shoot at him.

Did he shoot at him one time? Once?

Was he panicked once?

No, he could not have been, because this is not an automatic. It is not an automatic as you may have heard.

This is a revolver. There is not an automatic manufactured that will shoot five bullets at one time, let alone a revolver.

There is no such thing as a revolver that shoots five bullets at once.

This requires a pulling of the trigger each time in order to shoot, let the chamber revolve and press it again.

You will have this gun with you and I (1707) dare anyone, I challenge anyone to shoot five bullets at one time, and you will see this for yourself. You will see what effort you have to exert in order to release one bullet.

Was it loaded? Of course, it was loaded.

Walker said when he gave it to Godfrey it was loaded.

They went down armed with a gun, a revolver and an automatic, and even this automatic cannot shoot five bullets at one time. This requires a separate pulling of the trigger each time. That is so for even what we call an automatic.

The word "automatic" does not mean fires all the bullets at one pull of the trigger.

It merely means that it reloads itself. You will notice when you bump this gun the hammer releases and it clicks back into place. On this one it does it automatically.

You will have the opportunity to do this yourself.

They fired five bullets into Edward Davis' body. I say five bullets. It may be four.

(1708) Dr. Riegert said he believed that the seven wounds were the result of four bullets, but whether there were four bullets in him or five bullets, I don't know. It does not make any difference. I know there were at least four and I do know that when Johnson gave the gun back to Godfrey, all of the five bullets were gone because Godfrey, you will recall, gives the gun back to Walker with five bullets.

What happened to the fifth, I don't know. Whether they were lost in the clothing or whether they were lost in this toy store, I don't know.

We did find two bullets. One in Davis' neck and one on the floor, and these two bullets, ladies and gentlemen of the jury, were fired out of this gun, this revolver, that was carried by Johnson.

These two bullets were fired by Johnson out of this revolver.

It is not often, it is not often, ladies and gentlemen, that the State finds itself in the position where one of the bullets is still in the (1709) body of the dead man.

So that there can be no question, no question that this is the gun that fired the bullets.

When we were about to prove this by the ballistic expert from the State Police, this was admitted by the defendants themselves.

There is no question that this is the blood of Edward Davis on his clothing, and the bullet holes went through his body because, I think, you will recall the testimony of that learned gentleman, who was the chemist and the toxicologist from the State Police, with so much background and training, and all that was finally admitted as well.

Summation of Mr. Heine

Well, after they killed Davis, Johnson then escaped or tried to escape by bolting through the rear door.

The rear door, you will remember, was locked. How do I know it was locked? Johnson tells us that he observed it in walking from the car, around the front. He walks across in front of the church and observes the rear door of the (1710) Davis store because he already was planning his escape.

He was trying to find out in case anything happened, "How do I get out of this place?"

Did he hurt his finger there? Could be, but what difference does it make whether he hurt his finger pulling the door open or not.

I say to you and I concede that he was in a terrible and awful hurry to get out of the Davis store after Davis frustrated both of them by not dropping dead but staggered out to the pavement crying, "Help, I have been shot." (1711) after Johnson—and mind you, Johnson passed Cassidy on the way out and he bolts down Ferry Avenue. Cassidy runs back to the Godfrey car. And I suppose this was even part of their scheme too: Separate yourself right away, so that if anything happens, we don't all get caught together.

Johnson runs down Ferry Avenue and they must have agreed upon it, because, what happens? Godfrey gets Cassidy in the car, makes a righthand turn and a righthand turn, and makes a lefthand turn and picks up Johnson a block-and-a-half away. There was no one in the store. No one had seen them and they might have been successful, they might have been successful in making their escape and making the job much more difficult to detect—you can't but help to have an ironic view of this whole thing.

Was it poetic justice that a murder should have been solved because of a stupid violation of a simple traffic law?

When Godfrey came by Fourth and (1712) Ferry Avenue, where the lights were located, had his light been green, he would have made his left turn and nobody would have noticed it. The light, however, was red. He, mind you, was in a hurry. He had himself and another killer, another killer, in his car, and they were to pick up a third killer. They were on their way to get away. So, he passes a red light. He never knew it, he probably never observed that in making his left turn he passed a car that was standing there waiting for the red light to turn.

Some law-abiding citizen, some decent operator of a car was abiding the traffic light and waiting for the red light to change. This violation of the traffic law, as simple as it was, caused this citizen who was waiting for the traffic light to say to himself, I bet, "Well, why can this guy get away with passing a red light and I'm standing here, observing the law? Is it any wonder there are so many accidents on the highway?" and notices the license number: (1713) 4472, 4472. He thought it was a General Motors car, I think he said, and saw him pick up Johnson, or saw him pick up somebody. He didn't know it was Johnson. He didn't know that two killers were there, two robbers, killers.

Then when he hears that there was some excitement up on Broadway and Ferry Avenue, he starts to think, "Well, maybe this was them", so he calls 4472 into the police, which sets the police on the trail of Godfrey's car.

This gave them the scent. Now, the police are looking for Godfrey's car; and where do you look for a criminal? There is one fundamental law that these criminals never learn. That is, to stay away from where they did the crime.

Because, as old as crime itself, it seems there is some lure that makes the criminal return to the scene of the crime.

Now, they pick up the scent of the car. Do you remember Detective Large looked (1714) around, found it, trailed it for a while. The County Detectives and the City Police and the City Detectives finally tracked down Godfrey and his car, and they arrested Godfrey on Tuesday afternoon.

The next day, the next day, say Friday night, to take you back to Godfrey, Godfrey thinks he is in the clear. He doesn't know that he passed this red light, or doesn't recollect it. So, he goes down to the Click. This is apparently the "Club". This is where all of them apparently congregate.

He goes down to drink and he hangs around there in this taproom. He hears the police come in and they go down there, because they figure this is where the hoods may be. He makes no mention, he doesn't squirm. He is there drinking or playing records, or amusing himself. He finally meets up with his buddy, his friend of long standing, his confidante: Noah Hamilton. No mention of this at that time. And, he (1715) finally prevails on Noah to accompany him up to Campbell Soup, where he goes around eleven, eleven-thirty or so, to pick up his wife, who is getting out of work at twelve o'clock.

At the same time they are dropping off Noah's girl uptown at Broadway and Federal, so she can get a bus.

After they drop the girl off, they go down to Campbell Soup, and you remember this story from Hamilton, this is not my story. This is their confidante's story, their buddy's story. And I say this was a lucky evening for Hamilton. I am quite sympathetic with Noah Hamilton, because I think this took a lot of courage on his part to come in here

and testify against all of his buddies and friends. It took a lot of patience.

I think you sensed the reluctance on Noah's part to actually identify and put his finger on these people and expose them. But, to his credit, he did it, he did it. (1716) Reluctantly, or otherwise, he did it.

What does he say when he waited with Godfrey at Campbell Soup? Godfrey's curiosity burns in him. He sends Noah across the street to get a paper to find out whether there was any report of this hold-up. He inquires about a shooting. Noah says, "Yes, there was a shooting down on Broadway." "Where was it?" "Broadway and Ferry Avenue. The man was shot with a shotgun." Why did the paper report that he was shot by a shotgun? Because, when you look at these pictures and you see how many holes peppered Davis, you will think that he was shot by a shotgun yourselves. Noah says, "That couldn't have been me. We use guns. It was a shotgun."

(1717) He tells him about it. He said that was it, place at Broadway and Ferry Avenue.

Who else was in it? I think he tells him or doesn't tell him, I don't care, it is not important at this time to say.

The next day Godfrey arranges to pick up Johnson, to drive him to Newark. How does this happen? How does he come to pick up Johnson? How does this communication get to him? Word must have been passed around some place, because Godfrey arranges to pick up Cassidy and Noah who already knows about it to pick up Johnson at his house and drive to Newark.

I say, they arrested Godfrey on Tuesday afternoon.

Let's take Cassidy, what was Cassidy's part? Cassidy borrows the automatic from his fellow friend, he doesn't tell him what he is going to use it for, some sort of lame ex-

cuses, he's going to keep it for Brimm, he is worrying about Brimm having trouble with his mother about that gun that has been around the house for three years, all of a sudden Cassidy gets concerned about (1718) Brimm holding, keeping this automatic. He said, "I will keep it for you."

The thing that amuses me, while he was going to keep it for him, he got rid of it Friday night. However, he borrowed this gun several days before. He meets with Johnson at his home that Friday and then accompanies him on. He also tells Noah about it.

Now, when they drove to Newark, when they drove to Newark, the four of them, the three hoodlums and Noah, and they all, I believe, knew that Noah knew about it already, what do you think they were talking about on the way up to Newark? When he said, "My finger was hurt" or something like that, "How do you feel?"

"I don't want to talk about it any more, let's forget it." Yes, let's forget it, but why was he going there? To escape from Camden, to go into hiding, into seclusion.

Well, after Noah gives his statement and after we hear something from Godfrey, Cassidy is arrested that night, Tuesday night.

Now, we start, we haven't solved the (1719) crime, the police haven't solved this crime at all, and this is important for all of us to keep in mind. You remember there were three interrogations of Cassidy and there were two interrogations of Godfrey and there was one interrogation of Johnson.

Cassidy was the first one interrogated, starting Wednesday morning.

Now, when these interrogations take place, this is important for you to keep it, because the timing of it speaks for itself, and you will be able to follow it.

When Cassidy speaks first, the interrogation starts at nine o'clock, does he confess? No, he doesn't give himself the worse of it, he admits as much as he thinks he has to admit. Wise, withholds information, and at this time the crime hasn't been solved. This interrogation lasts until 10:20, in an hour and twenty minutes.

Now, they start interrogating Godfrey. When do they start? At 10:25, five minutes after they get through with Cassidy they start with Godfrey. Now, they start to pick up some information from Godfrey that Cassidy had left out. So (1720) they bring Cassidy back at 12:15, because the first interrogation of Godfrey lasts just about that time, I think it was twelve o'clock.

At this time this interrogation isn't all together for the purpose of a confession, the police are still looking for information.

You remember when Cassidy first talked about it, he didn't mention guns at all. Godfrey starts to talk about guns. Now we bring Cassidy back. When Godfrey talks about guns he doesn't say that he had any guns, oh, no, he puts it on the other men, and this is typical through all of these interrogations and confessions, that each one of them said the other two were to blame, "Not me, the other two."

They bring Cassidy back and they pick up some more information, and finally they take Walker late that night and they get some more information from him.

True, when we picked Johnson up on Wednesday, now they had a pretty complete story. This was the confirmation, this was a confession on his part. Now the thing starts to make sense (1721) and we find that every one of them had played their part in the conspiracy, in the attempted robbery.

This is why there were so many interrogations, because

each one said what the other one had previously said and added a little more, and you recall this was the sequence of it.

Johnson, what was his part in this? We start off, yes, he was at the house, he agrees to go in the hold-up, he takes the revolver, he takes the revolver, he agrees that he went into Davis' store, he came out, he went back to Davis' store, and it was finally agreed that this was the gun that shot the bullets that killed Edward Davis.

(1722) Now, have we proven the three points?

Have we proven one, there was a conspiracy and agreement to rob the place; two, have we proven that there was an attempt to rob the place; three did we prove that Edward Davis died as a result of gunshot wounds received during the course of this attempted robbery?

This, I submit to you, ladies and gentlemen of the jury, and I am confident that the Court will charge you is murder in the first degree.

At this point, at this point in my summation, in these opening remarks, I would devote my next few moments to discuss the evidence that might have been presented by the defense, but I am not going to do that.

I am sure you follow me in my reasoning. It is very simple reasoning.

The reason I am not going to discuss the defense is because there was no (1723) defense to the State's case.

I say to you, most respectfully, that the State proved its case beyond, beyond any reasonable doubt.

The State proved its case beyond any doubt.

The defendants chose not to take the stand in their own defense.

That was their right. They have a right under the law not to take the stand. However, the Court will charge you

as the law that where the defendants refuse to take the stand in their own defense, that from their failure to testify in their own behalf, you, the jury, may infer that they could not truthfully deny the incriminating facts that were proved against them.

I will leave that to you and perhaps comment upon it later.

Before I sit down, ladies and gentlemen of the jury, the State challenges each of these defendants to satisfy you that the State did not prove its case beyond (1724) a reasonable doubt.

The State further challenges each of these defendants to satisfy you that there was no conspiracy to commit robbery.

Further, the State challenges each of these defendants to satisfy you that this was not an attempted robbery in which they all participated.

The State further challenges each of these defendants to satisfy you that the State did not prove that Edward Davis was killed during the course of this attempted robbery.

I think you, ladies and gentlemen, as I have said on many occasions before, and you have heard this, that all three of these defendants were present throughout the conspiracy in the attempted robbery, during which the killing ensued. This, I am confident the Court will charge you, makes each of them guilty of murder in the first degree.

I challenge, on behalf of the State, each of these defendants in their argument to (1725) you to offer more than just idle words.

I challenge them to offer any facts that would warrant you in making a recommendation for life imprisonment.

Now, reasonable doubt. Yes, each defendant is entitled to the benefit of every reasonable doubt. (1726) Yes, this

is the law, and the Court will charge you it is the law, and the Court will define to you what is meant by reasonable doubt. The defendants are not entitled to every doubt. They are only entitled to every reasonable doubt. When I say this to you, ladies and gentlemen of the jury, this makes no difference, because to my way of thinking, and I trust to yours, there is no doubt about the State's case. And, for this reason, since there can't be anything less than a verdict of guilty of murder in the first degree, that this verdict should be without any recommendation at all.

I will have an opportunity to again speak to you after the defendants have advanced their arguments. I will close. This is the procedure. The man who opens, he closes the argument. I leave you with the thought that we suggest that you return a verdict of guilty of murder in the first degree against each of these defendants, without any recommendation.

(1727) Thank you.

THE COURT: Suppose we take a ten minute recess. The jury will leave the court room first.

(A recess is taken.)

SUMMATION OF MR. FLUHARTY.

(1728) MR. FLUHARTY: If the Court please, ladies and gentlemen of the jury, I too would like to join with the Prosecutor in thanking each and every one of you for sitting in this jury, for the patience that you have displayed. I know that this has been a hardship for each of you who had

to give up many of the comforts that you are used to enjoying. And I thank you for this. And my client, Wayne Godfrey, appreciates what you have done, coming into this court room without any bias or prejudice, with open minds, and not permitting yourselves to be overcome by passion and hate.

Now, you may recall last Friday when the Prosecutor spoke with you at the conclusion of his opening remarks, he said that he didn't know what the defendants would offer, he couldn't imagine what would be said and I recall that he even said that we might take that stand and might lie. But we haven't. We haven't taken the witness stand in this case, we haven't lied to you.

I told you last week why we were here. We are in this court room, we have been in this (1729) court room for the last two weeks for one reason, and one reason alone, and that is because the law of New Jersey in its wisdom saw fit that where a man is charged with murder, he shall be tried by a jury, that is where his life is at stake the jury shall make the determination as to whether he should live or die, and that is why we didn't come before you and offer any false defense, we didn't tell you anything that wasn't true.

What could Wayne Godfrey? Could he deny that he was involved in this conspiracy to commit robbery? As the Prosecutor has described it, could he deny those facts? There is no doubt, no doubt that he was involved, he was connected with it. No, he doesn't deny that.

Could he come into this court room and deny that Edward Davis lost his life? Could he tell you that Edward Davis didn't die as a result of gunshot wounds? He couldn't say that. I didn't even want to say it.

During the course of the trial I offered to admit that

Edward Davis died as a result of gunshot wounds. I offered to admit many things. (1730) Why? Because they are true. What could Wayne Godfrey say if he came into this court room, if he took this witness stand, all he could say he is sorry, he didn't mean to do it. What good would that do him? Would that bring Edward Davis back to life? Would that restore the life of this man? It certainly wouldn't, it couldn't.

And is there any doubt in anyone's mind that he is sorry? Look at the man, he sits there right now, his very life is at stake. Your verdict could send that man to his death. He spent a year in jail already, he sat in this court room for two weeks, he has listened to the facts, he has listened to the testimony, he looked at the horrible evidence, certainly he suffered. No doubt about it, none at all.

(1731) My position here before you, ladies and gentlemen, is one that is highly unusual.

Generally, defense counsel appear before the jury at the close of the case and place before the jury all the facts that will show that his client was innocent, that his client did not commit the crime which he is charged with.

I would normally point out to you the purpose of an indictment, the fact that it carries with it no evidence of guilt, but this case is not that way.

We offered no defense.

I gave no facts that I can come before you and place before you in behalf of Mr. Godfrey. It would do me no good to comment on the indictment, the purpose of the indictment or to dwell on reasonable doubt.

That is not in this case.

The thing that is involved in this case is the life and death of my client, Wayne Godfrey. That is all. That is

the (1732) only thing involved, and I say that that is serious, very serious.

Ladies and gentlemen, as the Court told you, you will so deliberate in connection with your verdict.

You will so deliberate as to whether your verdict should carry with it a recommendation for life imprisonment, or whether it shall not, in which event my client will be sentenced to death. He will die in the electric chair.

Why? Why is this necessary?

Why should he die?

There is one thing I know, I know that when you ladies and gentlemen deliberate on your verdict you will take with you the facts to which you have so patiently listened.

You will take with you the law as charged by the Court, but above all, more important than anything, you will take with you a feeling of mercy, a feeling of pity and understanding.

(1733) You will not permit all of this blood to blot out the feeling of mercy that we should all have for our fellow human beings.

Now, the State has asked that you return a verdict that will impose the death penalty upon my client.

Why?

The State has told you that this was a shocking, a bold, a brazen and unnecessary taking of human life.

The State has said that for those reasons Wayne Godfrey should suffer the death penalty.

All death is shocking. All death is unnecessary.

The natural instinct of the human being is to draw back from death. So, then, I say to you, if the reason you should sentence Wayne Godfrey today to the electric chair is because it was shocking and because it was unnecessary, then, why, why, should the legislature in its wisdom see fit to

give you the right if after examining the (1734) evidence you feel that you should recommend mercy, that you should recommend my client be sentenced to prison for life.

The legislature never gave you an empty right. They knew that death was shocking. They knew that death was unnecessary.

So, if that is the reason he should die, it would never, never, have seen fit to pass such a statute.

However, let us see if there may not be some reason why they gave you this right as they did.

Why did they give you this duty to make a recommendation or not, as you see fit, and as only you see fit? It is not because the Prosecutor has asked, or because anyone else has asked, but it is as you have seen from the evidence.

They did this for obvious reasons.

They knew that wherever a death occurred, even though it might be murder in the first degree, that the death penalty (1735) should not always be imposed.

Our law sets up what is murder in the first degree. It discusses the crime which is the result of premeditation, of deliberation, of intending to take a life.

The Prosecutor told you last week:

(1736) You should forget premeditation, deliberation, intention to take a life. That has no part in this case.

Now, it may be true that premeditation, deliberation and intention to take life are not necessary for this crime to be murder in the first degree. But why forget those facts? Because the statute that sets forth that murder in the first degree requiring premeditation, deliberation and intention to take life is the very same statute that goes on and makes those homicides that occur during the course of a robbery or an attempted robbery, likewise, murder in the first degree. The very same statute discusses both types of murder.

I say that is why the legislature saw fit to give you this right. Because they knew a case such as this very case, would come into a court room, a case where the defendant such as Wayne Godfrey had no intention to take anyone's life—there was no premeditation, there was no deliberation. He had one thing in mind and only one thing, and all of these three defendants had (1737) one thing in mind, and that was to commit a robbery.

Now, that is wrong. I do not condone it. I do not expect you to condone it. But that is all they intended. They did not intend to take anyone's life.

You can recall from the confessions the shock exhibited by Wayne Godfrey when he learned that someone's life had been taken. That was no part of the plan. That was no part of the conspiracy. It wasn't a conspiracy to take life, a conspiracy to kill. Wayne Godfrey is not a killer. He is a robber. That is all. Not a killer. He did not kill anyone. He never intended to kill anyone. And this is why you were given this right, and this is why I say that you should exercise this right, that you should recommend life imprisonment for my client, Wayne Godfrey.

I say, further, that the State has assigned to you these reasons, this death that was shocking, that was bold and brazen and unnecessary, they told you because of that, that the (1738) death penalty should be imposed. But I say that the Prosecutor realizes this is not enough. Why do I say that? Because I was willing to admit that Edward Davis died as a result of gunshot wounds. I was willing to admit he bled. But, no, the State wanted to go on. The State wanted to prove he bled. The State wanted to show you the blood. They showed you pieces of cotton with blood on. They showed you pieces of cardboard with blood on them. They show you pictures with blood on the pave-

ment. Everywhere blood. Every witness that testified spoke of blood, blood, always blood. Why? I'll tell you why: So that you would learn to hate Wayne Godfrey, so that you would develop a feeling in your hearts of hatred, because unless you hate him, you cannot return a verdict that would impose the death penalty upon him.

That is the reason for all this blood. But I say to you again those same legislators that I spoke about before, the same men that gave you this right, they knew that every killing, every death involves blood. They knew that. Every- (1739) one knows that. But they still gave you the right.

If they had intended that every killing that occurred where blood was shown, where there was blood in the case, that there you should sentence the defendant to death, they would never have given you such a right. Because blood cannot be the answer.

How do we know? Sure he bled a lot. Did he bleed a lot? Did he bleed a little? What difference did it make? The man bled and it is horrible and it is shocking. That is not the reason that Godfrey should go to the electric chair because Edward Davis bled.

Again I say that this is the case where your rights should be exercised. This is the case where the defendant, Wayne Godfrey, sits in this court room only because of this robbery. He was involved in the robbery. That is all. He had nothing to do with the killing of Davis. I think the testimony has clearly shown that he was on Jasper Street. I don't know how far away it is. Is it a block? Is it two blocks? Does it (1740) matter? He wasn't even in the store.

What could he have done? He couldn't have prevented it any more than he could have brought it about. It hap-

pened. Maybe if he were there, it would not have happened. We don't know. But we do know that he never intended it to happen.

I say to you, ladies and gentlemen of the jury, if you should return a verdict that would impose the death penalty upon my client, you will be no more sure of the righteousness of your verdict than a mob that would hang or burn its victim. Just because Wayne Godfrey would die in the name of justice. That is no answer. The fact that the Prosecutor would ask you to return a verdict that would impose the death penalty upon my client is no answer. Justice? We speak of justice. I believe in justice. I know you ladies and gentlemen of the jury believe in justice. But what is justice? Who knows what justice is? Who knows what Wayne Godfrey deserves? Do you truly know what he deserves? Can you look in his mind? Can you look into his heart? Can you look into his background and really know what (1741) Wayne Godfrey deserves, what justice he deserves, what punishment he deserves? I know I can't do that. I don't think the Prosecutor can do that.

(1742) Only God Almighty, who is the Judge of us all, in His infinite wisdom, knows what punishment Wayne Godfrey deserves. Is there any question in the mind of anyone of us what His judgment would be? His judgment would carry with it mercy and understanding, it would be blasphemy for me to stand here and say that it would be anything different. We all know that.

Then, why does man, why does the State say that they have the right, in the name of justice, to take the life of Wayne Godfrey.

They have the legal right, but they don't have the moral right. It would be wrong.

Now, there may be those who would argue that if Wayne

Godfrey's life were taken, if he suffered the death penalty, this would benefit society, it would benefit the community. Would it? That is a death has a demoralizing effect on everyone, whether it be the death of Davis, or death of Wayne Godfrey, (1743) it makes no difference, it makes no difference at all. So that it won't benefit the community, or won't benefit society, not one bit.

Now, I say to you, ladies and gentlemen of the jury, and I stand before you asking for mercy for my client. I ask that you spare his life. It is your verdict that can return a recommendation for life imprisonment, mercy.

Let's think for a minute. Is it mercy that I want? How little can I ask? Think for a minute, if you will.

Wayne Godfrey, twenty-eight years of age, life imprisonment. Is this mercy? Day after day, week after week, month after month, with nothing to look forward to but prison walls, iron bars, hostile guards, nothing. Is that too much to ask? Too much to ask for a man who had nothing to do with the death of Edward Davis, who couldn't have done a thing to prevent it, that couldn't bring it about, that wasn't even there. Isn't that (1744) enough punishment? What man or woman wouldn't be satisfied with that? What member of society wouldn't be satisfied with that? That should be sufficient punishment. We can't ask for more. To ask for more is to ask you ladies and gentlemen of the jury to do that which is contrary to mankind. To do that which ignores any hope we may have for the future, because if there is going to be any future at all in this world, if there is any future for any of us, it is only through mercy and understanding, that is the only way. If it is going to be hatred and revenge in the hearts of everyone, we will have no future at all, this world is a pretty bad place right now. And, if there was some mercy and understanding in

everyone's heart, I am sure it would be a better place to live.

That's all I am asking. And I say to you, I know there will be a future, there will be a time when attorneys such as myself will not have to stand before a jury (1745) and beg for the life of their client, and this day is going to come. I don't know when. Seven States have already seen the wisdom in abolishing capital punishment. We have more to go. The time will come when it will be fully abolished, everywhere.

I say to you, Delaware has just recently abolished it. New Jersey, is New Jersey any less civilized than Delaware? Some of you ladies and gentlemen of the jury probably have friends in Delaware. Are you any different than your friends? Do you have any less mercy in your hearts than your friends from Delaware? Of course not. We are all the same, all of us. Just because we have certain geometrical boundaries between one State and another makes no difference. We all have a feeling of mercy and understanding.

Now, let's review for a moment, if you will, this sphere of punishment, this capital punishment, the death sentence, if you will.

(1746) You all know there was a time, from your history, in England, some two hundred crimes were punishable by death. In this country, in Salem, Massachusetts, there were burnings of people accused of witchcraft. People were not put to death by gas chambers, by the electric chair, but by some of the most horrible tortures known to man. People were boiled in oil. What was the effect of all this killing? Did it blot out crime, did it stop killing? It had no effect at all. In fact, statistics show us that as we become more merciful and more understanding of crime

and criminals, that crimes decrease. As these horrible tortures and these gruesome deaths were done away with, crimes decreased, and yet I have to stand here and ask and beg and plead for mercy for my client, that his life will not be taken. Why should it be? If it is not going to deter crime, what purpose will it serve? It will serve none. No valid purpose will be served by (1747) taking the life of Wayne Godfrey, none at all.

The only reason the life of Wayne Godfrey could be taken, or would be taken, is that of revenge, hatred, and that is the only reason. The only reason the State kills anyone, the only reason the State takes a life is because the defendant, they say, took someone's life. So, if he killed, let him be killed. Think of that for a moment. The State kills because he killed, without purpose or without reason, just because he killed somebody.

How does this apply to Wayne Godfrey? Who did he kill? He didn't kill anyone. He wasn't even there. He took no life. He had nothing to do with it. He was involved in an attempted robbery, that's all, for which he should be punished, for which I don't condone myself, and I don't expect you to, but he didn't kill anyone, he never intended anyone to be killed. He never deliberated and con- (1748) spired to kill someone, it happened. It is horrible, it is unfortunate, it is a shame, but to take his life will not bring Edward Davis back to life. The only thing that will be accomplished if they were to take his life is we will satisfy certain hatreds that might exist against this man because he was involved. That is all, just hatred, hatred.

But I say hatred is not what we should look to. Mercy, that is what we should have. Mercy for my client. And, I say to you, ladies and gentlemen of the jury, I beg and

I plead with you, when you deliberate the verdict, for my client, Wayne Godfrey, I ask you to bear in mind the words of the great Teacher when He said "Blessed are the merciful, for they shall obtain mercy." He taught mercy, He taught love, He taught understanding, not hatred, and I ask you, ladies and gentlemen of the jury, to return a verdict with mercy, return a verdict recommending life imprisonment for (1748a) my client, Wayne Godfrey.

Thank you.

SUMMATION OF MR. CAGGIANO.

(1749) MR. CAGGIANO: With the permission of the Court, members of the jury, in some fashion I too must display my gratitude to each of you for your endurance for serving on this jury.

I do remember that last weekend some of you were not quite well. I am sorry for it.

I hope, however, we are well and healthy so that we can properly conclude this case as we planned to do when we started.

Definitely, definitely this is quite an experience for you, and I venture to say that, perhaps, you will never have such an experience again.

It does not happen every day that we sit on a jury to deliberate a murder cause and for that too I extend my sympathy. Definitely your job is going to be extremely difficult.

It will be one that will take all the courage you possess. It is one job that must have your full and complete understanding and your sympathy and your mercy.

Summation of Mr. Caggiano

At the opening of the case, it was mentioned by the Prosecutor, something to the (1750) effect that these defendants had the audacity to enter pleas of not guilty.

Members of the jury, by law they are dutybound. They have no other alternative. There is no other course open to them.

The State requires you to enter a plea of not guilty, and you will be tried by a jury, and not only shall they determine the innocence or guilt but too they shall determine what penalty shall you suffer.

What is penalty?

Penalty is punishment.

Someone commits a wrongdoing and they must be punished.

How do we punish them?

When you committed a wrong, how were you punished? Perhaps your father would not let you use the family car that Saturday night, or maybe your allowance was cut off for a week or two. That was punishment, and it taught you that in the future you should not again make that same mistake. By that we learn.

What can one learn from death? What cure (1751) can that serve?

To kill these boys, who will benefit? Sincerely, does the State benefit?

Do you, as individuals, benefit?

As members of our society, do you benefit? Definitely not.

Who suffers? Then, the truth be this:

Stanley Cassidy will not be the one who suffers the most if he should die in the electric chair. Believe me, he does not suffer the most. It is this fast. The suffering is over, but those that remain behind, it is the living that suffer.

A dead man can suffer nothing at all. He can feel no pain. He is dead.

Nonetheless, as I say, we did enter a plea of not guilty as proscribed by our law.

Great mention was made, and undoubtedly will be further made by the Prosecutor to the fact that the defendant failed to take the stand, and because he did not take the stand, the witness stand, we may all assume that he did not (1752) do so because he could not deny that which is charged.

That is an honest statement. The action of the defendant was an honest act.

He has not taken the stand to conjure up stories and lies.

The facts are as they are presented.

Was not the testimony or the statement made by Stanley Cassidy at the interrogation of Chief Dube presented?

The questions were read to you and the answers were read to you.

(1753) There is nothing more you can say. That which he said is true, that which he has said has been introduced as testimony in this case by the State and therefore the State is bound by the evidence they introduce.

Our Prosecutor cannot say that Stanley Cassidy lied. Whatever is in this statement made by Stanley Cassidy is true. I know it is true. Of course, again, my opinions are not binding upon you, and my reason for knowing that it is true is because of the meetings and consultations I have had with Stanley. We have been over this many, many times.

I know it is true because I know Chief Dube, and Chief Dube is a fine interrogator. If you do not answer truthfully, believe me, he will question you until he does get the truth, and Chief Dube got the truth.

Some mention was also made to the effect that a statement was taken first, one in the morning at 9:00 o'clock and then later on at 10:20, another one, or concluded at 10:20, a little after that another statement made.

(1754) The reason for the subsequent statements was not because of the fact that there was falsehood, not because what he said, the questions that were asked and answered, the answers given were not true. It was only because of the fact that the interrogator decided, after further investigating and questioning others, that there were other questions he wanted to ask. Every question he asked Stanley, he answered. And we could not expect Stanley Cassidy to answer a question that was not asked of him. No one could do that. If we are not asked the question, we cannot answer the question, and we could not expect Stanley Cassidy to anticipate questions that the Chief of County detectives should ask.

Whatever question was asked, he answered it, answered it as best he was able. In his first statement, that taken January 29 at 9:00 A. M., Chief Dube asked of Stanley Cassidy: "Tell me in proper sequence what happened?" And Stanley started his answer this way: "I walked in the store and I walked in the back like I was looking for something, and Sylvester was supposed to come (1755) in back of me. And as I was walking toward the back, Sylvester came in and he said 'This is it.' And the man turned and I heard a shot and I turned around and the man was reaching for Sylvester, and I heard another shot and he shot the man and ran past me." Paused there and continued on.

Is that not true? Aren't we convinced that that is just what did happen at 1731 Broadway? Is there a question in anyone's mind that it didn't happen that way? We must

be possessors of terrific imagination if in our mind we can develop anything else. For that is just what happened. Stanley Cassidy, without dishonesty, when asked the question, tried to give the answer as best he was able; not because of the fact that perhaps he might say something to help himself in an answer like that. Does that help him? Is he trying to hide? Could anyone give an answer which would implicate them in a greater crime? Could he become more involved? He just could not.

Now, ladies and gentlemen of the jury, I guess we are all tired. I know I am tired too, but we still have our jobs to do. We are going (1756) to do them. We all have the courage to do them.

There is going to be one test for you members of the jury that is going to be exceedingly difficult, in fact, bordering the impossible. You were read the confession of Stanley Cassidy. The only defendant bound by that confession is Stanley Cassidy. After we followed with the confession of Wayne Godfrey. The only one bound by that confession is Wayne Godfrey, and whatever Wayne said about Stanley or any reference to Stanley or to Sylvester, you must set that aside.

That is why I say it is going to be a very, very difficult job. How will you be able, after having heard the three individual confessions of these defendants, to disseminate and to remember exactly who it was that said this? He is only bound by that, not the others. It is going to be very difficult.

Please, during the stages of your deliberation, try as hard as you possibly can to remember each of their individual confessions. Try to remember, not what I tell you, not what the Judge tells you, not what the Prosecutor tells (1757) you, but what you remember that which Stanley

Cassidy said. And through the course of your deliberations be guided and be concerned only with what he said. This is the law.

Let us get back to the happening of this tragic affair. Beyond all doubt no one likes killings. We are sorry to hear of them. However, it is done, and that which is done cannot be undone. And when I say that to you, please do not misunderstand. I am not trying to talk it over, pass it by, or overlook. The death of Edward Davis was shocking. Edward Davis was shot and killed during the commission of a hold-up. They did not conclude it but there was the attempt. There was no question about that, no question about the fact that this gun was used, this little revolver.

This is the gun that exploded, and whether it had been four or five shots, three shots, regardless of the number, they were bullets that did kill Edward Davis.

But how did that happen? Did they go in there to kill? I am certain at this moment that (1758) each of you in your minds have definitely been convinced that they did not intend to kill. I do not say that because they did not intend to kill that the crime was not committed. For our law says that during a holdup, a robbery or an attempted robbery when a homicide ensues, that that is murder in the first degree. But can't you rationalize and realize that there are lots of kinds of murder too? There are lots of kinds of first degree murder?

Definitely, if we think back to the celebrated case of Loeb and Leopold, you may be familiar with it, that was murder. But can you compare that type of murder with the type that exists here?

Someone disliked someone else. So they sit down cold bloodedly, calculating, trying to determine how they are

going to get even and they dream up a plan whereby they can take their knife or their gun and lay in wait for their enemy, and as he goes by, kill.

Isn't that a different type killing that exists in this case? Of course, the net result (1759) for the victim definitely is the same. But the killing itself is different and should not the punishment therefore be different?

Why should it be that you, as jurors, be permitted in rendering a verdict of guilty of murder in the first degree to further have the responsibility and the duty to determine the extent of the punishment if it were not because of the fact that there are killings and there are killings? There are differences. Then we could well say the law should be this: If you are guilty of murder in the first degree, there should be no recommendation. You should be punished, you should be sentenced to death, you should die in the electric chair. But it is not that; and again, the reason being because we must consider everything that surrounds this particular case to determine just what degree of first degree murder could it be.

If driving my automobile with wanton disregard of the rights of others and perhaps, going so far as to say at the time I am intoxicated, is that too not a killing if someone is hit and dies? Even there compare it with the type of (1760) killing that exists in this case. If a man kills his brother, is that too not a different type killing? And isn't it so that, again, because of the variances, we must have a variance of punishment? I am certain we could all understand that.

What happened to Sylvester Johnson when he went into that store? Again, please let me say this: What I may say about Sylvester Johnson, you should not take as fact. These are just thoughts of mine, inferences that I have

drawn from hearing and listening to the testimony in this case. But they walked into the store, and I'll bet you they thought they were going to have an easy job stealing this man's money, robbing him.

If they didn't think it was going to be an easy job, they wouldn't have done it. Stanley walked in first, walked off to the rear of the store. He was going to attract the attention of the proprietor, and as he does this, Sylvester Johnson comes into the store. They now have the proprietor between them, Stanley to the rear, the proprietor somewhere in the center and Sylvester (1760A) Johnson

(1761) And Johnson says something to the effect "This is it" and then Edward Davis turned around. Edward Davis, as you remember from the testimony, was a robust individual, he is a pretty big man, former boxer and wrestler, and he grabbed for Sylvester Johnson again, and I do not blame him for trying to protect himself, I cannot blame him for trying to protect the property that he owns, but that is what happened. And, when it happened, Sylvester didn't concede, no question about that at all, and there was a tussle and in some of these photographs you will see boxes strewn, overturned articles, and that is because of the scuffle between Edward Davis and Sylvester Johnson. And in the tussle this gun was fired, three times, four times, five times, and as it was fired, some of the bullets did hit Mr. Davis. The doctor testified he believed four hit him, and how was the gun fired? It was not the question of looking and taking aim. It was fired rapidly, and even after Edward (1762) Davis was hit, at the first instance, Sylvester Johnson didn't realize that he had hit him, because, if you remember, he said he still kept coming for me, coming at me, and then in his panic he ran. That is a natural instinct. Panic, and you run. Being extremely

frightened and you will run. So, he runs. And definitely, if thinking, he could have run out that front door without difficulty, but the State says no, he runs out the back door and has to break a piece of wood, or something that is holding the door, or the door is closed, or what, or both, he takes the hard way, again, because of panic.

The Prosecutor has challenged defense counsel for us to explain what our defenses might be. Explain why these boys should not receive the extreme penalty, explain why they shouldn't die in the electric chair. For the defense, what can we explain? The facts are as they exist.

At the start of the case we decided (1763) that we agreed that we wanted to propose that they brought out into this Court room all the facts, we wanted all the truth, for then we could assemble the facts, all the truth, and come to a fair and just conclusion. We are coming close to that point. You have all the facts, the facts remain undenied. They are true. There is no question about the facts, that they are true. We cannot deny them, so we do not deny them. That is the only way I am able to answer that challenge of the Prosecutor.

As for the challenge as to why we believe there should be mercy, why we believe they should not die, I say this. If you are to condemn, you must hate. Hate will breed nothing but hate. Cruelty will breed nothing but more cruelty, and that is not our purpose, that is not our desire. We wish to be fair, we want to be just.

For their wrongful acts, they will be punished, beyond doubt, they will be punished.

(1764) What should that punishment be? Can we imagine, can we perhaps say life imprisonment is insufficient punishment?

You remember when we opened our case we discussed

reasonable doubt, and if I remember correctly, I made some mention of the fact that reasonable doubt shall remain with these defendants throughout the entire case, throughout the entire deliberation, and that it will not adhere just to the facts of the case, but every phase of this case, and a very important phase being the punishment, the penalty that they shall receive.

Reasonable doubt should help also and should remain with you in your deliberation.

Many times people may argue that it is quite simple and maybe following the line of reasoning is this, the easy thing would be to say, well, guilty of murder in the first degree, and that be it, realizing that that verdict would carry the penalty of (1765) death for these defendants, and believe me, I believe that to be the line of least resistance. It will take courage for each of you in determining the fate of Stanley Cassidy to somehow try, although I believe it is not too difficult, but even though it may be difficult, to try to go through the entire case, pick out whatever there is, as small as it may be, something that you might say, well, because of this I have cause for mercy, and look a little further and find something else, and again concede because of this, "I must extend a little mercy." To do that as a juror is a courageous act. To do that as a juror is a difficult act. I am certain that there is no member of this jury that lacks courage.

(1766) If I am taking too much of your time, I am sorry; believe me, I am, but minutes now, as compared to life imprisonment is definitely an inconsequential thing now.

Is it not so that they sit there now and these may be the limiting minutes of their lives, depending upon your verdict.

I have not known Stanley Cassidy for a long time.

I did know his father. I always knew Stanley to be a good boy, however, no one could have been more amazed than myself when I found out what happened here.

He has made a mistake, a terrible mistake.

The truth of it is that I have thoughts too, as well as we all do, and one of the severest of crimes, one of the worst crimes is armed robbery, and that was the crime that they had intended to commit.

The reason why it is such a bad crime, an evil crime, is not because of the (1767) deprivation of the property of the individual victim, that is not important, but because of what happens.

Someone becomes panicked; someone gets excited; there is a struggle, and now we are in the Court room.

That is the reason why I do not like it, but as much as I dislike the particular crime of armed robbery, I could not punish anyone to such an extreme that we should annihilate them completely, take them from society, and there is only one way to do that, and that is to kill them. I do not think you should do it.

I think there is still a lot of good in Stanley Cassidy, and were this a wilful murder, I would not have any regard for him, but it was not a wilful killing.

It was not a planned killing, but definitely it was a killing, and because of his wrong, he must be punished.

I sincerely hope, and I will pray, that after your deliberations, that you will (1768) return a verdict, and that that verdict will be coupled with mercy.

Thank you.

THE COURT: We will take a ten minute recess and cool the room off a little.

The jury will leave the room first.

(Recess taken.)

(1769) (After recess.)

SUMMATION OF MR. BERTMAN.

MR. BERTMAN: With the permission of the Court, ladies and gentlemen of the jury, I too want to join with the others in expressing my thanks and appreciation for the patience that you have demonstrated during the course of this trial. I want to express my appreciation and thanks for the attention that you have given to the evidence. I could not help but observe that during the reading of one or two of the confessions that some of you members of the jury could not hear certain portions of it and you asked the Court Stenographer to raise his voice so that you could hear it, and I appreciated that because there is no question in my mind but that you members of the jury have paid attention and are considering every phase of this case.

I am going to ask you to be a little patient with me. I am going to refer from time to time to some notes that I have typed here, and I may refer to some of the (1770) testimony. If I hesitate, I am going to ask you, as I say, to be patient with me, because I want to try to bring out everything that I possibly can.

As you know, His Honor has already informed you, we are going to finish up today, and tomorrow the Court, His Honor, will charge you as to the law in this case. That will be Saturday, and that date is January 24 of 1959. It is rather singular that on the very day that this offense took

place, that you members of the jury will begin your deliberation of the fate of these three men.

One life has already been taken, that of Edward Davis, and the State is seeking the lives of three more people.

As the Prosecutor has said to you, under our rules of procedure, it was incumbent, or his duty, to open to you first when this case first started sometime last week, and then we presented our defense to you.

Now, as you have observed, the procedure is more or less reversed. The Prose- (1771) cutor did open on this occasion when we finished the whole case, and then it was our turn, Mr. Fluharty, Mr. Caggiano, and myself. After I finished, the Prosecutor will have an opportunity to answer what defense counsel has stated to you.

I bring this out to you for the reason that I cannot anticipate everything that the Prosecutor will say to you in answer to what I may state, or what other counsel have stated. I must, of necessity, at this time more or less try to anticipate what he will say, in an effort, or in an endeavor to more or less try to cover those points. It may be that I will not be able to anticipate everything the Prosecutor will say, and I ask you members of the jury to take that into consideration. Because there may be some things that you will hear from the Prosecutor that under our rules of procedure I am not able to reply to, and I ask you to examine that and if there is anything that I have been unable to reply to, I ask you to more or less (1772) stand in my place and examine the evidence to see if there was or may be some reply to something that I could not anticipate.

There are going to be some things that I may say to you that my other two colleagues have already stated. I don't want to be repetitious, but I don't want to run the risk of

not covering everything that I have in mind. So, I ask you again, if I am repetitious, please bear with me.

One of the things that I think I can explain in this case, and my two colleagues I think have done so, but I am going to go through it again, is to explain to you why we entered a plea of not guilty.

I think the Prosecutor in his opening said to you—and I do not know whether I am using the right word or not—but I think he said that we had the effrontery to enter a plea of not guilty.

Let me read to you what our statute provides. I am reading Section 2A:113-3 from the New Jersey Statutes that says:

(1773) "In no case shall the plea of guilty be received upon any indictment for murder and if upon arraignment such plea is offered, it shall be disregarded, the plea of not guilty entered and a jury duly impaneled shall try the case."

(1774) That is why, members of the jury, we are here today. So let us have it clearly understood that by law it was utterly impossible for us to plead not guilty to the charges in this case.

I also think that I can anticipate that the Prosecutor will have much to say to you in regard to the fact that the defendant did not take the stand. And I believe that the Prosecutor will charge you—rather, have the Court charge you that the failure of the defendant to take the stand from that fact, that you may infer or believe that the defendant could not successfully answer the evidence or charges against him.

Now, members of the jury, I think the Prosecutor will dwell upon that I believe he has already earlier this afternoon.

I told you members of the jury at the beginning of this

case that I had made up my mind that we were not going to present any trick defense, that we were not going to try to fool you, and that we were going to ask the State to prove their case according to law, and I think that we (1775) have done that.

I told you that the defendants were entitled to have the charges against them proven against them according to law.

And, members of the jury, the reason that Sylvester Johnson did not take the stand was because I don't believe and I know that he could not successfully deny these particular charges against him. His confession certainly implicates himself.

Now, members of the jury, many times juries may get the idea that this is a personal contest between members seated at counsel table, that this is a contest between the Prosecutor and myself and other members of the defense. We have no contest here. The Prosecutor has presented his case, in accordance with the law, and in accordance with what he feels is his duty.

Members of the jury, this case was lost a year ago by the defense. This case was lost when a citizen had the alertness of mind to take down a license number and reported it to the police. This case was lost from that day on. (1776) There is no contest here as to who wins or loses the case. No matter what happens, the State wins this case. The evidence as you have heard it shows, and that you can draw from that naturally, that a robbery was attempted and that during the course of that robbery a killing took place. But, members of the jury, you are not compelled by law because you find that a robbery took place or attempted to take place, and that there was a killing in the course of that robbery, to bring in the death penalty.

It is not mandatory. And I think that you know that from the questions that we asked you during the time that we questioned you as prospective jurors.

You members of the jury are obligated to consider all the evidence. I cringed last week when I asked some jurors, prospective jurors, whether if they found Sylvester Johnson guilty of first degree murder that they would automatically give him the death penalty without considering any other evidence or any other extenuating circumstances.

Some of them answered, "Oh, well, he was (1777) the one that did the shooting, and that is the one we would give the chair to" or "That is the one we would give the death penalty."

You members of the jury that are on this case now, in answer to my question whether or not you would consider all the evidence in assessing the penalty in this case stated that you would, and I have no doubt in my mind that you members will faithfully carry out that duty.

I tried in getting the jury in this case to dismiss or eject those jurors who I felt might have a little partiality or bias, and I feel that there are fourteen members here, and when this matter is over, there will be twelve of you, and I feel confident that whatever verdict you give will be a verdict that you yourself give after considering all the evidence, that each one of us gives, after considering all the evidence.

(1778) Members of the jury, you heard me speak of mitigating and extenuating circumstances, and you heard me speak of it in connection with my client, Sylvester Johnson.

You heard me ask that question, as I stated just before, would you, if you found Sylvester Johnson guilty of murder in the first degree, sentence him to death by virtue of

the fact that he was the one who did the actual shooting, and then I went on to ask you, or would you consider all the evidence, and would you consider whether or not there were any extenuating or mitigating circumstances, and everyone of you answered in the affirmative.

Now, members of the jury, what do we find when we consider the evidence?

Just briefly, what does this case consist of?

The case consists of the following facts, as adduced by the State.

That three men attempted to commit (1779) a hold-up.

Three men, ages twenty-seven, twenty-five and Johnson, twenty-one, and you find that there is some sort of a scattering of testimony that a Noah Hamilton had given that, perhaps, Godfrey had planned this thing some weeks before. I don't know the truth of that, but that is for you members of the jury to consider.

You find further that two days before January 24th, Cassidy in his statement said that he got a gun from someone by the name of Brimm and that Godfrey got a gun, I think, the day before January 24th, from someone by the name of Walker.

Further, that Cassidy kept his gun at home and that Godfrey then gave his gun to Cassidy to hold.

Then you find that on the morning of the 24th, according to the confession given by Johnson, that he went out to look for a job.

He went to an employment office (1780) and registered his name, came home at about ten o'clock or so, stayed home and played some records, listened to some records, and then about four-thirty he went around to Cassidy's home. (1781) And that when he got to Cassidy's home he sat there for a while and then Godfrey came in.

Summation of Mr. Bertman

I want to point this out, and I think it is important, because the man that I represent is the man that did the actual shooting, and that is that up until there was a conversation just before these three men embarked on this particular situation, that there is no evidence in this case whatsoever that Johnson conspired or planned or had in his mind to commit a robbery, let alone commit a murder.

Now, the Prosecutor did say to you before that, he said, "Maybe these men did talk it over at some date before." But the evidence produced by the State, and this is the evidence produced by the State, not by the defense, and any evidence that they produce is binding upon them—that Sylvester Johnson did not know Noah Hamilton, did not know Brimm and didn't even know Walker; but that the other two, Cassidy and Godfrey, did get guns from those two men.

Now, members of the jury, as I say, you have these three men: Johnson, age 21 and the (1782) other some years older, not too much older, I think maybe one, three or four years older and the other, a couple years older than that. Then they embarked upon this trip and they went to commit a robbery.

Johnson said that when he got to Cassidy's they had some discussion that they were all broke and that they needed some money, and then they said, "Well, let's rob the place."

Now, I am going to read to you from Page 8 of Sylvester Johnson's confession, a question put to Sylvester Johnson by Chief Dube:

"Q. After he got to the house there was you and Wayne Godfrey and Stanley there. Right?

"A. Yes.

"Q. Was there any discussion then about anything going on in the house?

"A. Yes, we were talking about we were broke and wanted to have some money and the discussion came up about robbing somebody."

Now, according to their own testimony—and they are bringing up the testimony of this confession, this is Johnson's confession. They took this one confession. There were no alterations (1783) to it, no additions, no corrections. This is the testimony that said the first time that Johnson said or knew anything about a robbery was when they discussed it just before they left the house.

Now, Noah Hamilton didn't say anything about Johnson. Walker didn't; Brimm didn't. So that the evidence is entirely barren of anything that might lead any person here to believe that Johnson knew beforehand what was going to take place.

Now, then, I am giving you some of my recollection of the facts, and as the Prosecutor told you, my recollection is not binding upon you. Naturally, whatever you believe the facts to be, that is what will control. Now, did Johnson have any intention to commit a robbery or, rather, did Johnson have the intention to commit a killing? Let me take it in that order first. Did Johnson have the intention to commit a killing?

Up until the time they had discussed this situation just prior to leaving Cassidy's home, there was no intention for Johnson to do anything unlawful. As soon as he left Cassidy's (1784) house and they got in the car, his intention then was to commit a robbery.

The Prosecutor will most likely tell you that if you place a gun in someone's hand, that it is a dangerous weapon. If you are going to hold up somebody with that gun, whether you intend to kill them or not, that the worst is liable to happen. And members of the jury, it did happen

in this case. The worst did happen. There was a killing. But I say to you members of the jury that that killing was absolutely unintentional.

What happened in this particular case? Was there any premeditation? Was there any deliberation? Was there any cunning? Was there any tricks to take a person's life?

As I say, Johnson's idea in this situation with the two others was to commit this robbery, not a killing. Now, how and under what circumstances did this killing take place? I think and feel, as you members will do, that the evidence completely explains that. This killing was more or less accidental. It took place during a struggle or a tussle. Some of the (1785) members of the jury may not have been called yet as prospective jurors, but I recall in the early questioning of some of the prospective jurors, the Prosecutor, in informing you of what the law may be, informed you that this may be an accidental killing, but that it is still first degree murder.

Later on, during the course of the questioning, he changed that word "accidental" and omitted it in his future questions. But there were a number of jurors who did have that question asked of them in explaining the law.

(1786) Now, I am going to refer you to this very same confession which Johnson made. This confession which is binding upon the State and is the only evidence which the State has against Sylvester Johnson.

I am going to read from Page 18. The question was put by Chief Dube, starting about the middle of the page:

"Q. That he meant he was there and you were toward the front of the store, is that right?

"A. Yes.

"Q. You say you pulled a gun out and told him it was a stick-up?

"A. Yes.

"Q. Then what happened?

"A. We started tussling."

And this is the question put by Chief Dube:

"Q. Did he grab you?

"A. Yes.

"Q. What happened then?

"A. When he grabbed me, we tussled and everything, and the gun went off, and when the (1787) gun went off, I didn't know what happened, I was scared, and I was just shooting. I don't know what happened.

"Q. Do you remember how many times you shot?

"A. No.

"Q. While you were tussling with the man and shooting, where was Stanley?

"A. I don't know, I guess Stanley was in back of him.

"Q. And this was toward the middle of the store this took place?

"A. Yes.

"Q. Did you know you had hit the man or shot him?

"A. No, because he was still coming after me. I didn't know what was happening. I was panicky. I don't remember what happened.

"Q. You say you were shooting, but you don't remember how many times you shot; is that what you say?

"A. Yes.

"Q. But it was more than once?

(1788) "A. I don't know. I guess it was.

"Q. And you say you don't know whether you hit the man or not, because he was coming at you?

"A. Yes.

"Q. Were you shooting at him to stop him from coming at you?

"A. I guess so, I was trying to scare him."

Now, members of the jury, I even think that Chief Dube was convinced that this was a tussle and struggle, because even throughout his questioning, throughout his questions, without any prodding or leading from Johnson, Chief Dube referred to these questions as the matter having taken place during a struggle or tussle. (1789)

Now, members of the jury, let me give you my feeling about this. I don't say that what Johnson did was excusable. I don't say that it was justifiable. Edward Davis had a right to protect his property. Edward Davis had a right to grab Johnson, or to lunge at him. The law gives him that right.

Now, Davis, and I think you heard that from the testimony, was sort of a robust and courageous sort of a man. He was a boxer, and probably, and undoubtedly, proud of his physical prowess. As I say, I don't excuse what Johnson did, I don't excuse him for becoming panicky, I don't excuse him for coming in with a gun, but I am bringing out to you members of the jury a lack of intention, a lack of premeditation. (1790)

There is one inescapable fact in this case, and that is that it is unfortunate that Davis was a robust and courageous sort of a man, because if he wasn't, he would probably be alive today, and I don't blame Davis, as I have said to you, he had a right to do what he did. But, we don't know, members of the jury, how we would react when confronted with a situation like this. Some of us would faint, probably, at the sight of a gun; some of us would say, "Here, take my money" and feel that discretion was the better part of valor. Others may feel, "This is my property and by law I have a right to protect it."

But I say that to you, that there is one inescapable fact, that had Davis said, "Here is my money," the only thing he would have lost would have been probably $290.00 he had in his pocket, and not his life.

I want to emphasize on you what Davis did was right, but had he been a man with a little less courage, had he been a man, the type of a person like most of us are, not that we lack courage, but when we recognize danger we act accordingly, and I bring this out, members of the jury, to show that there was no intention, no premeditation, on the part of Johnson, that he came there, and got scared and when he saw Davis lunging at him, that these shots were fired.

And I noticed the Prosecutor in his opening, took this gun, and I don't think he did it intentionally, but he pulled (1791) it like that (Mr. Bertman exhibits) and you had to release the gun, and I think he did it in slow motion, and as I said, I don't think he did it intentionally, but I could do it a lot faster (Mr. Bertman exhibits) and I think the reason the Prosecutor showed you it was being slow, was to show that Johnson deliberately stood away and aimed each time.

I want to ask you something else. The evidence showed that Davis lunged toward Johnson and that he did not fall down. There was a struggle between them. The evidence as produced by the State in the confession of Johnson binds the State. There was a struggle.

I will ask you something else. One shot was up here, another here, and another down at the groin. Isn't that evident that there was a struggle with a gun back and forth. Why would the shots have been so widely separated. And, as I pointed (1791A) out to you, this gun could go pretty fast. (Mr. Bertman exhibits.)

(1792) As I pointed out before, Johnson had no intention before coming to Cassidy's house to even commit a robbery.

I am going to refer you to Page 8 of Johnson's confession.

The question that was put to him by Chief Dube was, "Was there any discussion then about anything going on in the house?

Answer: "Yes. We were talking about we were broke and we wanted to have some money and the discussion came up about robbing somebody."

Now, on Page 10:

"Did you make preparation or get armed or anything before you left to go down there?"

That was a question asked by Chief Dube.

The answer was, "I went out in the car and I was given a pistol.

"Who gave you the pistol?

Answer: "Singy.

Question: "Did he give you a pistol when you got out the car?

Answer: "Yes.

Question: "Did Stanley have a pistol?

(1793) Answer: "Yes."

Is there any evidence in this case, any evidence in the case whatsoever that Johnson contacted anyone before the discussion on January 24 just prior to the time that they left?

Did he contact anyone for a gun or talk to anyone about a gun in this case?

Is it not evidence that he came around to Cassidy's house to kill some time?

What happened then?

This 21-year old came there, plans were made and he was given the gun. Then this unfortunate affair took place.

Members of the jury, let me quote to you also on Page 53 of Godfrey's statement.

Page 52, if you please.

This is the question put to him by Chief Dube, Chief Dube to Godfrey.

"Will you tell me just what happened there, bearing in mind everything you tell me must be the truth, and of your own free will without any threats or promises having been made to you, knowing whatever you say can be used against you or any (1794) other person in court?"

Answer: "I went to James Walker and asked him if he had a gun."

Question: "When did you go?"

Answer: "I think Thursday."

Then you know the statement of Cassidy when he went to get the gun from Brimm.

There is something else here, which, I think, is important.

The last statement taken, the last confession was that of Sylvester Johnson, and that confession was taken on January 30th, 1958, at 4:45 A. M. in Camden.

That was after Johnson had been in Newark the day before, and was seated in a living room there at his uncle's home watching television. He probably was there for some hours. The police arrested him, took him to Newark, took him to police court there and then took him to jail and then finally brought him to Camden.

I thought, and I may be mistaken, that what the Prosecutor was attempting to show was that because Johnson gave his statement last, that (1795) he had the benefit of knowing what the others had said, and that for that reason

his statement was honest and truthful, because he knew that he had been trapped or had heard what the others said.

Members of the jury, those people that arrested Johnson were with him the preceding day from five o'clock, all through the night up until 4:45 A. M. when he was taken directly to the Prosecutor's office and Chief Dube testified that he was questioned immediately.

I want to point out that there were two statements taken by Cassidy, or from Cassidy.

One was on January 29 and began at nine o'clock in the morning. That one concluded at 12:45 P. M.

Another statement began at 11:40 P. M. that same evening and concluded at 11:50 P. M.

There were three statements taken of Godfrey. The first one on the 29th of January began at 10:25 A. M. and, I think, it concluded at 12:00.

Another, the last statement began at (1796) 11:15 P. M. and concluded at 11:35 P. M.

There is one in between there, and I have searched through and I cannot find the time, but there were three statements of Godfrey.

These statements were taken of Godfrey and Cassidy while Johnson was away, and had no means or opportunity of reaching Cassidy or Godfrey to know what they had said, or to know whether they might have changed or corrected or amended their statements.

The reason I bring that out to you is this:

The statement of Johnson was truthful and honest, because when that was finished, that was the end of it.

They have no testimony whatsoever to change that, and that is the only testimony you have concerning what Johnson did when he went to the Davis store in so far as

whether there was a tussle or not, and that testimony as presented by the State is binding on them.

Members of the jury, I have taken upon myself, as counsel for Johnson, to control and take (1797) over his case and prepare and defend it.

Johnson has followed my advice.

He has stated that he will abide by my judgment. It was my judgment that he would not take the stand and, I think, that I have pointed out to you why he did not take the stand.

Naturally, I am very much concerned about Johnson. He is my client and he is the one, as I said, who did the actual shooting.

I point out these various extenuating and mitigating circumstances to you because I want you to consider and understand why this defendant, Johnson, did the shooting, how it came about and what happened.

I want you to take into consideration also his age. He had just reached the age of 21, maybe a few months over, which, according to law, is the age of reason.

In so far as the law is concerned, that is the age when persons are responsible for their contracts and can make legal obligations.

Some people may develop slower than others. Some people may develop faster intellectu- (1798) ally than others. I think that that is a point for you members of the jury to consider.

I think it is a point for you members of the jury to consider that here is a youth of 21, and as to whether or not his mind was such that it would be pliable and perhaps influenced by the maneuverings of others. (1799) This man Johnson came to the Prosecutor's office. Chief Dube asked him some questions. He was mere putty in the hands of

Chief Dube. There were no threats. There was no attempt to evade. There was no trickery Anything that Chief Dube asked him he answered honestly and truthfully. I bring out to you that he hadn't reached that age or state that if he had the mind to evade this sort of thing that he would be tricky in his answers and evasive in his answers. I think that the age of this defendant, Johnson, is an important thing to take into consideration for this particular act, and I say to you members again, that you cannot close your eyes and just merely consider the fact that Johnson did the actual shooting, and not take all these other circumstances into consideration.

Members of the jury, I think that we have had something like 43 exhibits brought in here by the State, and when this thing happened, when the license number was reported to the police by the witness that was (1800) here, I don't recall his name, the State, County Police, rather, the County Police and the City Police went into motion, as the Prosecutor stated, and they were efficient, and they got their men and I am glad of it. Because the State, the County Prosecutor's office, the detectives there, and the City Police Department are efficient. There is no question about that.

The Prosecutor here has presented a case in continuity and given you the benefit of all the facts. I say to you people that if you came in this case with the thought that perhaps you were going to see legal wrangles and much cross-examination after witnesses had taken the stand, if that is what you had in mind, I am sorry that you are disappointed. As I said to you, this was not a contest. We had nothing to cross-examine. What good would it be for me to cross-examine the ballistic expert, or the people that took the samples of the blood, or the gun, or the bullets,

and so on? It (1801) would only be taking up your time and would only be clouding the issue.

The issue in this case, members of the jury, is whether or not you people should find it in your hearts to give mercy to these defendants. Let me put it even stronger: Whether you people should find it in your hearts to be able to give mercy to these defendants, which defendants did not give mercy to Davis.

What will the State have you do? The State will have you take away from your mind and your conscience the right to extend that very mercy which they come in here and say was not extended to Edward Davis.

Members of the jury, as I said, there are something like forty-three exhibits here. You are going to have these exhibits in the back. Here you have clothes that are splattered and strewn with blood. Here you have three pictures of the deceased showing him with the bullet holes and blood on him. Here you have other pictures showing blood (1802) all over the pavement and store, various parts of the store, and so on.

Members of the jury, killing is horrible. It makes no difference what form it takes, whether it is with blood or without blood. The State knows that. I assume that in every case that is ever presented by any Prosecutor in any County, in any State, that they will always bring in these exhibits. They feel that it is customary and it is part of their duty.

But, truthfully, what is the purpose of these exhibits, to show you this blood and to have these things back with you in the jury room? Isn't it to inflame your minds, to feel that this offense was horrible? Some people may shrink away at the mere cut of a finger when they see the blood. As I say to you, killing is horrible in any form.

I want to ask you something else. There are many kinds of killings. This killing falls within the category of murder (1803) in the first degree.

There is also a killing, not committed in the perpetration of a felony, and that is a killing where, perhaps, someone cunningly, slyly, deliberately, with premeditation and intention over an extended period of time may kill another person by giving them, perhaps, a dose of poison or, perhaps, an overdose of sleeping pills.

Now, let us assume that person, as is the case in many instances, dies peacefully in their sleep. Ask yourself this: They are both murder in the first degree. Yet, why will juries of rational, composed of rational men and women, still extend mercy and give mercy to a killing that is premeditated and cold-blooded, such as a deliberate and intentional planning of the death of someone else? Is it because that person died peacefully in their sleep? Is it because you didn't see exhibits full of blood? Is that the reason?

I ask you, which kind of killing (1804) is more horrible, which is more cold-blooded? This type of killing that took place in this case, where some shots were fired during the course of a tussle or struggle and the man bled, and you have before you these various exhibits filled with blood, or the killing where someone plots to put someone to their death? And yet I have seen juries, as I have stated, extend mercy to killings of that type. I can't understand it. Why they would do that in that instance and not in a situation like this.

This isn't the type of a killing where a child, some little boy, or some little girl, or woman, was mutilated, dismembered or abused. It is not that type of a killing. I do not excuse it.

I say to you, members of the jury, the law provides a

penalty for these defendants. I say to you, members of the jury, that you are not compelled, it is not mandatory for you to bring in a verdict of first degree murder and stop right there. His (1805) Honor will charge you that. It is not mandatory for you to do that. The law, in its wisdom, saw fit to provide you with the right to give mercy.

Members of the jury, I guess that the Prosecutor will say to you that this was a horrible killing. And he has attempted to give you a picture that this was a horrible killing. I think that I can visualize or picture another killing, a legal killing, which, by law, would be horrible.

I am going to speak for my own client. I can see Johnson in prison garb. I can see him with his head, his hair clipped, his head shaven. I can see a little room with an awesome looking chair. I can see his hands shackled to the arms of that chair. I can see his legs shackled to the arms of the chair, and then I can see and hear thousands of volts passing through, and then I can see this man convulsed and distorted by pain and shock, and then I can see death.

I think that is even more horrible (1806) than the killing that took place in this case.

Members of the jury, I guess that the Prosecutor feels that this life should be taken. I want to know why it should be taken. Why do they want his life? What will happen if this horrible scene at the State Prison in the death house is enacted? What will happen? Will crime cease in Camden County? Will we declare a holiday and say now that Johnson has been electrocuted and sent to his death, there will be no more crime, no more killing in Camden County?

Members of the jury, let us be realistic. Killing has gone on and murders have gone on from time immemorial, and

they will continue to go on and on, and on, no matter what you people do here today.

I say to you members of the jury that electrocuting this defendant will no more cause a stopping, or no more be a deterrent for future killings, or hangings, or death by gas, gas chamber, or whatever way you want (1807) to have it, than thousands of other killings, electrocutions or hangings and other forms of barbaric legal killings have been a deterrent.

Does the State want the life of Sylvester Johnson because by law you are required to render the death penalty? I have covered that, and I want you to know that you are not compelled to give the death penalty. You have a right to give mercy and, as I said before, you have a right to give that very mercy which, perhaps, this defendant did not extend to Edward Davis. And I say to you again that his failure to give mercy was not intentional.

Members of the jury, I have probably taken up quite a bit of your time. If I have, I am sorry. As I said to you before, at the beginning of this case, I have lived with this case now close to a year.

(1808) And I say to you that this man is a human being just as you and I or anyone else in this court room. And I say to you that during the last few weeks I have spent many sleepless nights because of any concern in this case. It has given me great concern.

Have I done something in this case that I should not have done?

Did I fail to do something that I should have done?

Would my failure to put him on the stand or would my failure to produce this witness or that witness or say something to you be the cause of this man's death?

I mean that sincerely and honestly, it has caused me great concern.

You are going to take this case to the jury tomorrow. His Honor will charge you. Tomorrow is Saturday, and I don't know whether you will reach a verdict by Sunday or not. But Sunday is the day of the Sabbath, and I know that many of you in this case have been torn away from your homes, have been required to stay away (1809) from your places of worship.

As I say, Sunday will be the Sabbath. That day more than any day or the day before rapidly approaching the Sabbath is the day that you should be more merciful than ever.

I told you, members of the jury, when I opened this case that I was happy that you people were members of what we term a blue ribbon jury. We told you that we consented to having a blue ribbon jury because we wanted this case heard by people of more than average intelligence and intellect.

I sometimes wonder whether it wouldn't be best when you have a case of this type to have members of the jury who are older than you members of the jury. I remember one man during the course of the interrogation as a prospective juror said that well, he had gotten up pretty far in life, and he didn't have too many years left, and that he couldn't send anyone to his death. I wonder whether if I could have gotten a jury composed of the twelve who will eventually hear this matter, of older people, whether perhaps that (1810) mercy, that compassion, that the older person would give would be extended to this defendant.

But when I questioned you members of the jury, and you assured me that you would not permit bias or partiality to enter into this picture, and that you would try this

case according to the evidence, I felt assured that if people do have the benefit of experience, do have the benefit of maybe a little more intellect or intelligence than the average person, that with that experience, intelligence and intellect comes wisdom and with wisdom comes understanding.

I think, members of the jury, because you members of the jury are persons who have little more than the average experience in intellect, that you are wise, that you do have understanding and I ask you members of the jury in closing, "Would God in His wisdom extend mercy to these men"?

Thank you.

THE COURT: We better take about a 10-minute recess to get some air in the court room. The jury will be removed first.

(1811) (Jury leaves the court room.)

(Brief recess.)

SUMMATION OF MR. HEINE.

(1812) MR. HEINE: With the permission of the Court, ladies and gentlemen of the jury:

This has been a long, hard day for all of us.

It has taxed the most of our patience, our indulgence, and I am afraid to say that it has even taxed our sensitivity of intelligence.

I will talk about this in a few minutes.

What I want to say now is just as the day is coming to a close, so is this trial.

This is the last opportunity that I, on behalf of the State, will have to talk to you.

We are engaged in a very serious business, and have been for the past two weeks.

For you the serious business will not have been over, but it will commence in real earnestness tomorrow, when this case is (1813) left with you for determination.

This is important. This is serious, not only to the State, and believe me, it is most important to the State, but I acknowledge that it is important to the defendants also.

The importance of the case warrants that we submit to a little personal inconvenience, recognizing that the hour is way past the hour of the ordinary adjournment for a trial day in our Courts.

I do not know any of you personally. To the best of my recollection, I have never seen, or even heard of any of you jurors prior to the commencement of this trial, but you have impressed me no end with your earnestness, your zeal, your thirst to do everything that you possibly can to properly decide the important issues that will be presented to you for determination.

Again, you have the thanks of the State, the thanks of the County, and you are to be commended.

(1814) I mentioned before when I spoke to you earlier, that I was presenting the argument on the State's behalf, the defendants would argue, and then I would close.

I am about to engage in the closing argument of this whole trial.

The only thing left will be the charge of the Court as to the law.

I thought that I had a pretty good memory, and while

there were a lot of kudos thrown at the Prosecutor as to his duty, and how fair he has been, I was quite amused on the other hand to hear that I had stated that the defendants had the effrontery to enter a plea of not guilty.

One attorney said that I had stated that the defendants had the audacity to enter a plea of not guilty.

I can excuse a lot of misstatements about the evidence, and I do not want to comment about that now, but I do want to comment about misstatements or misquotations about what I said.

(1815) Last Friday, when we opened this case, I made a statement after I presented the State's position of what I intended to prove, and as to my theory of the case. I thought that I had recollected it pretty well, but in order to be sure, I sent for the stenographic transcript of what I had stated, as recorded by these stenographers, who are the official Court Stenographers here to make up the official record of every word that is uttered here in this court room.

I said this, and lest I be misquoted again, or lest you may get away with a different impression, this is what I said: "I don't know what defense the defendants can offer to this. I have not the faintest idea what explanation they can now make. Under the law I may not inquire from them. All I know is they have pleaded not guilty."

That is the sum of what I said to you on that day.

It is true that I have no right to demand that the defendants tell me what (1816) their defense is going to be.

They entered a plea of not guilty. I made no comment about that. That is all I knew, and I would have hoped that when they did present their openings last Friday, following mine, that they would have indicated, not only to you, but to me, for the first time, what their defense could have been.

They also stated, and this is important, because a lot has been stated about these confessions, and you did receive instructions yesterday on many occasions from the Court that the confessions that were read to you, the confessions by each one of the defendants, the confessions of Cassidy, the confessions of Godfrey, and the confession of Johnson, were only to be considered as evidence against the confessor, and not to be used against any other defendants mentioned therein.

You have the right to consider all of the confessions, or any part of the con- (1817) fessions. This is a fact. These confessions, as I indicated earlier today, these confessions themselves, stem from interrogation at the time when the Police and the County Detectives were still searching for the solution to this killing.

They had plenty of opportunity to make their own self-serving declarations, and is there any question that in the first instance Cassidy lied?

He lied about going to work that morning with Godfrey. He was no more down at the docks with Godfrey than either you or I were.

Is there any question that Godfrey lied before he knew what the facts were, when he went so far as to say that he drove his wife to work that morning, when the truth of the matter was that she had worked that night, when he went to get her with Noah Hamilton.

(1818) These self-serving declarations—you can pick up a line here. They weren't giving them the worst of it. But this is beside the point, ladies and gentlemen. The point is that the State's case doesn't depend on these confessions. Haven't we proved by other witnesses every part of this confession? Didn't we hear it from Noah Hamilton? Didn't we hear it from Walker? Didn't we hear it from Brimm?

Didn't we hear it from Ognissanti, the first citizen who spotted the car when he was waiting for the red light? Didn't we hear it from the chemist and from the toxicologist, and didn't we hear it from the ballistic man and didn't we hear it from the fingerprint expert, and didn't we hear it from Noah Hamilton? Didn't we prove a case without the confessions?

I say we submitted a case that would support any verdict of first degree murder without the confessions. These confessions were merely the bow to dress up the knot that tied this whole package together.

Ladies and gentlemen, now I hear, and now I understand why they said nothing last Friday (1819) when they opened, why these attorneys didn't make any claim for a defense. Now it is crystal clear. Now they finally admit. What was there to deny? The State had proven a clear case. The defendants had confessed to it. We merely are here as observers. This is the situation and now they don't even take the opportunity to get on the stand. Who speaks for these defendants? Are the attorneys speaking for the defendants? And why shouldn't the defendants speak for themselves; when someone says that he is sorry or he is sorry or he is sorry, why don't we have the opportunity to hear whether or not they are sorry? This they denied themselves. They denied it to you and to everyone else, the opportunity to hear for themselves. Wouldn't this have indicated some sorriness on their part? They wouldn't expose themselves on the stand. They didn't dare get on the stand. They would rather hide behind some self-serving statement snatched out of context or otherwise in a confession. They didn't dare take the stand and bare their breasts and say we are sorry.

(1820) Therefore, you have a right, and intelligently so

and logically so, to say the reason they didn't take the stand is because they could not truthfully deny the incriminating evidence proved against them, and the Court, I trust, will charge you the law on this situation.

They talk about the Bible. This I expect. I expect there would be quotations uttered by the attorneys about passages from the Bible. This is not out of the usual. This is not out of character, but they don't quote that passage from the Bible which says: Who shall shed man's blood, by man shall his blood be shed. This is in the early part of the Old Testament, as early as in Chapter 9 of Genesis.

What else do they tell us? They tell us that nobody intended a killing, that they only intended a robbery, and even though the Prosecutor has stated that premeditation is not a part of this case, you keep it in mind. Well, ladies and gentlemen, premeditation, as I explained to you on many occasions, is not a part of this crime. It was not necessary. We (1821) could have rested on the attempted robbery, and this we chose to do, and this is the claim we make and this is the case we are presenting to you, that this was a killing in the course of an attempted robbery and for this the law clearly says: Shall be murder in the first degree.

We do not have to prove premeditation. But, wasn't there premeditation? Wasn't there an intention to take life? Didn't Godfrey intend to take life? Was he only a robber and not a killer as someone has suggested? Then why did Godfrey start to assemble the arsenal? If he didn't have murder in his heart, why was it necessary for him to go out and get a gun for the conspiracy?

No denial of this, is there? This is Godfrey's handiwork, his contribution to the conspiracy that he conceived in his illicit mind.

Is this the act of only a robber? If they had robbery only in their hearts, if larceny was only in their hearts, why was it necessary for both of them to take two armed weapons, both of them? These weren't held by Godfrey in the car (1822) when they went in, unarmed. These were possessed by the strongarm guys, the killers, and both were loaded. Is this the act of only a robber? If they only wanted to wrestle with Davis, and if they only wanted to rob him, why didn't they take a toy gun, a make-believe gun? Why didn't they take an empty gun and scare him? Then, if it failed, they would have been held for attempted robbery. But there wouldn't have been murder.

Did they start out premeditating about robbery? Let me leave this with you for a second. They walked into the Davis store. They walked out. What were they talking about when they sat in the Godfrey car before they entered the second time when they decided to go back and finish the job? Was that premeditation?

Godfrey, the ringleader, the conniving fingerman, the man who put the finger on this, planned it for a long time.

Cassidy, this lamb, he knew it for several days, because he obtained the Brimm gun. He helped to assemble the arsenal. What did they now do? Each jockies for his own position, because (1823) among thieves they have got larceny against each other, each one trying to get out in case anything breaks. Let's get into a favored position. Godfrey stands outside in the car so that if anything happens he is not in it, he says. As long as Johnson is shooting at Davis, Cassidy is willing to stand by and let it happen.

Well, what would have happened if another customer had come in and Johnson's gun had been empty? What would have Cassidy done then? Or if on their way out they had bumped into the policeman? What would have happened

then? Didn't they have murder in their hearts then? All of this is now conceded by the defendants. They say all of these facts, the State's theory, is now conceded to be the truth. We admit it. They all now would like to plead guilty to first degree murder, and I suppose the question is, are you now going to deny them the opportunity of being found guilty of first degree murder.

The penalty for first degree murder is death. This is not your doing. This is proscribed by law. You have a right to change the (1824) law by recommending life imprisonment, but when do you have that right? Is it just a blank right that you have? You have heard this time and time again, that the penalty for first degree murder shall be death unless the jury, upon the consideration of all the evidence, recommends life imprisonment. I want to emphasize: Consideration of all the evidence, not the consideration of the milarky of the attorneys, not the consideration of some hypothetical situation, but a consideration of all the evidence. And now when the defendants say everything the State said they were going to do and did and proved against us, what evidence do you have which will warrant you in recommending life imprisonment? Absolutely none.

(1825) Now, ladies and gentlemen, this has been touched upon by one or more of the attorneys for the defendants who say not every first-degree murder case merits the chair, the death penalty. This I concede. This I concede.

I will tell you some examples of first-degree murder that may not warrant the death penalty. These you will find are where the original circumstances are innocent and a death or killing occurs, then you say, well, this was beyond anybody's contemplation. The original circumstances were innocent.

Suppose, even in this case, had they entered Davis' store,

and suppose there was a tussle, and Davis had slipped and fell on one of the cartons and bumped his head against the table, or a carton, and died? I could understand someone saying this was never intended beyond anybody's comprehension. This would be first-degree murder, this might warrant.

(1826) Suppose the irate husband discovers a disloyal wife, goes out and seizes a weapon and engages in a tussle with the paramour? This might be first-degree murder, but this might, on the other hand merit a recommendation or consideration by you for recommendation.

These are innocent situations that develop beyond what anybody expects.

But, when from the moment this was conceived in the cunning, despicable mind of Godfrey, when he went out to assemble the arsenal, joined by the slick Cassidy, who assembled the other half, was there anything innocent about this original purpose? The purpose was lust, robbery, murder, if necessary.

Now, how can anybody in their right mind now say death wasn't intended? We only intended to rob. Wouldn't this be, wouldn't this be some state of affairs if the law, if you would countenance this kind of a defense, where three defendants agreed that they conspired to commit a robbery, armed themselves, (1827) attempted the robbery with armed guns, killed the proprietor, and now come in and say, "We didn't intend to kill him, we only intended to rob."

This is what you are expected to condone, and I have heard it from all of the defendants that they think that you are an intelligent jury. Well, do they mean that? And if they do mean it, do they think that you believe that and will accept that as a defense? I think this is insulting your

intelligence. Maybe if there were twelve other jurors, this could happen, as I heard one of the attorneys argue, but this is not the jury that I see in front of me. If the defendants are entitled to get away with this kind of a lame excuse, then you are putting a stamp of approval on armed robbery and you are putting your stamp of approval on murder resulting from armed robbery. It is as simple as that.

I hate to think what would happen to our community and your community if you (1828) condone this type of a situation and accept this as a reason for recommending life imprisonment.

What about the safety and the security of the decent, the law-abiding, the God-fearing people? What about the safety and the security of storekeepers in your community and mine? What can they look forward to if the most intelligent jury of Camden County says, "This receives our approval and condonation?"

Ladies and gentlemen, some theories were advanced as to why this killing took place. I don't know why this killing took place. I don't believe that you know why this killing took place. I may have said this earlier, I don't know, but my answer to that is that we don't know because you and I don't think the way these criminals think. We are not trained to think their way. They set themselves up different standards of conduct, different guides for living. I hate to think that they (1829) believe that they have a right to rob and kill, knowing that the most highly respectable and intelligent struck jury of Camden County won't have the courage to discharge their responsibility according to their oaths to mete out the punishment in accordance with the law. I don't believe that you will fail in your courage.

This killer, Johnson, he didn't panic. He pulled the trig-

ger five times. Davis, that poor soul, was shot from the groin up to his nose. You remember Dr. Riegert saying he must have been on the floor in order for the bullet to have gone through his body at the angle. Well, is this the man that panicked? He emptied his gun into the defenseless body of a poor, decent toy storekeeper, Edward Davis by name. And, do you know what shocks me, and must have shocked you, that I heard in this court room, that because Edward Davis was a robust individual, that this now works to their benefit, that if he did make a strug-
(1830) gle to defend his own money, his own earnings, that he accumulated by the sweat of his own brow, this goes to their credit, because if he was a puny man, and had merely turned over his money, this wouldn't have happened.

Well, this is what you ladies and gentlemen can expect if this becomes a law. That some hood, or hoodlum, can poke a gun into you, or into your husband, and if he isn't a robust man, or doesn't have the courage to resist, and if anything happens, this makes it okay for the defendants.

Where is the reasoning? Doesn't this shock your conscience to have even somebody suggest this? Isn't your intelligence insulted, if this is going to become the law?

All I have heard here, all I have heard is, "Ignore the evidence, because we have pleaded to this thing. We are wholly complete, we concede it is true, we don't resist it, but ignore it anyway and give us (1831) mercy."

Not mercy that the defendants themselves have asked for, but mercy that their lawyers asked for.

Now, talking about mercy, and I think someone mentioned this about "Look at these defendants, aren't they sorry?"

Well, you have had an opportunity of inspecting them and observing them for two weeks, some of you. All of you,

at least, for the last week. I haven't had too much opportunity to observe them, because for the most part my back was toward them, but I did have ample opportunity on a number of occasions, and it struck me, and I am sure that it struck you, that they were so callously indifferent ——

MR. BERTMAN: If Your Honor pleases, I don't want to interrupt, and I don't think this is proper argument. It is not evidential, and I don't think it is proper argument.

THE COURT: I will allow it.

MR. BERTMAN: I am sorry, excuse me.

(1832) MR. HEINE: That they were so callously indifferent to all that went on. My only observation as to the way they felt about this trial is that this was an opportunity to have a dress parade.

I did notice that each one of them changed a suit each day. Well, maybe they are fashion models, maybe they are the slick boys, big-time stuff, maybe they are; maybe they can dress in Ivy League suits, fancy shirts, high-priced ties, look the smart boy, visit the night clubs, drink, know the records, maybe they are. On whose money? On the Edward Davises' money.

These are the boys that are sorry? To hang around the taprooms and night clubs?

Is there any denial that Cassidy, on this Friday night, went gallavantin' around to his Philadelphia night club with his girl friend? Is she the one who is going to suffer if something happens to him, this Mollock girl?

What are we talking about? There (1833) were times

when I didn't think I was in the right court room. I didn't recognize these defendants.

(1834) Do you know why they can take this attitude? They can sit here because they have trained themselves to have an indifference to law and decency.

They don't believe, they don't subscribe to our way of living, and if you ladies and gentlemen of the jury, if you decent, respectable people put your stamp of approval on it, if you condone these killings, if you condone these armed robberies to enable these boys to lead the slick lives that they do, if you condone it by recommending prison terms, may the Lord above help all of us.

We will be returning the law of the jungle, talking about the law that they want, we shall be returning the law that the man who is the quickest on the draw, he will be the kingpin.

I suppose the man who has the most notches in his gun, he will be the fellow who will be respected in the neighborhood.

Well, I don't want that law and I don't (1835) want that manner of living, and I don't believe, looking at you ladies and gentlemen, that you subscribe to this kind of lawlessness.

Each one has said, each one has said, that the State is asking to take three lives for the one. This is what it amounts to. We are asking too much, and mind you, ladies and gentlemen, when I talk about the State, I am not talking about some artificial person, some corporation.

The State is made up of its citizens, citizens like you, like you, like you and I, all of us put together. We make up the State, and the State is here. You are here asking for justice.

Three lives for one. What difference does that make?

I am not asking you on behalf of the State to weigh three lives against one.

This is not being weighed on a scale of numbers.

We are not even talking about quality, but let me say this:

We are asking that they be measured on (1836) the scale of justice.

This is the scale that they ought to be weighed on, not a numerical scale.

Talking about a scale, would not the body and soul of one, Edward Davis, this decent, law-abiding, God-fearing man outweigh the three hoodlums that planned to rob and even to murder?

I would not trade all three of them or any multiple of three of them for a one Edward Davis.

However, do not put it on that basis.

Aside from that, do you think they would have stopped with one Edward Davis as I did mention before if they had to kill in order to escape or to get rid of a customer that interfered with this robbery?

The community was fortunate—most fortunate that no one else came across their path.

These are the reasons, these are the reasons that I say the State is fair in asking for the death penalty for all three of them.

They were all in this together and mind (1837) you, you must have observed that they stuck through this all together too.

They all intended to share equally in the loot.

They lost, and they ought to share equally in the punishment.

(1838) I heard it expressed and you were asked: Would you consider any mitigating or extenuating circumstances?

I heard this argued time and time again: Would you consider extenuating or mitigating circumstances in their favor?

This is an insult to your intelligence. Small, feeble puffs of smoke were blown up from time to time. They can never congeal into even a light smoke screen. There is not one single extenuating or mitigating fact of any kind, no circumstance that would justify you in exercising a discretion to make a recommendation.

Death for murder in the first degree has been the law of this State even before it was a state, ever since we were a colony, even when we were a branch of the England from whom we draw our common law. The punishment for murder in the first degree was death.

This, the law proscribes, not you. And we, the State, you and I, all of us, all decent citizens, all citizens of the State, through our legislature, have never seen fit to change the law. If there is any one we can feel (1839) sorry for, ladies and gentlemen, let us start to feel sorry for Edward Davis. Let us give that poor soul a sorrowful thought, that unfortunate human being who was wiped off of this world by three hoodlums before he reached his allotted time on this earth: Fifty-five years of age, in the prime of his life, snuffed out by three hoodlums.

Talk about fairness, talk about giving him a fair trial? Don't you think the State gave him a fair trial? They were right in demanding the State prove everything against them, and weren't you impressed with the thoroughness with which the law enforcement officers investigated and prepared this case for trial, with the thoroughness, how each dot and tiddle fell into its own place, how each little piece of evidence, no matter how insignificant, a piece of card-

board, a piece of paper, identify the bullets, identify every chain, everybody who handled them reported in.

Do you know why I paraded these witnesses here for you to hear? Lest I be criticized: What happened? This would be the first thing that they (1840) would hurl at me. This is why we insisted on proving it. I didn't want them to agree to it. I wanted to prove to your satisfaction that they were entitled to receive the death penalty.

I do not subscribe to the practice that might exist in other countries, where life is snuffed out at some trial like that because you opposed the Government. This is not my way of thinking. The State does not ask that. The State was ready to prove, did prove, every last bit of it. It was not because I rejected the offer of the attorneys time and time again who were willing to agree.

I did not want to be remiss in my duty of proving that they were entitled to be proven against. No advantage was sought from them. We gave them a two-week trial. How much time did they give Edward Davis? We gave them the benefit of every doubt, but what doubt did they give Edward Davis, and aren't they the ones now to come in and say "We didn't give it to Edward Davis, but we ought to get it from you." This is a machination that works in the mind of a criminal.

(1841) Ladies and gentlemen, punishment for crime is not all together retribution. The State does not say, because one life was taken, therefore another life must be taken. No, we don't come in on that basis. There are two reasons for punishment. You may have heard this time and time again, but let us get it clear here, because you are now concerned with it. There are two reasons for punishment, the first, punishment to the offender of the

law and the second, a deterrent against others from breaking the law.

This is your opportunity, ladies and gentlemen, to flash a warning light to all of the hoodlums in and about Camden County and the State of New Jersey and to anyone else who dares to repeat this similar offense, that we will not tolerate it. We do not like this kind of business in our community or anywhere else. This is your opportunity, ladies and gentlemen, to shout out in a call that will be heard unmistakably all around that death awaits the criminal who kills in the course of crime. This is your opportunity, ladies and gentlemen, to say that we decent people stand for (1842) law and order. Is this important? Edward Davis had a right to earn a livelihood in his toy store. Would anyone deny him that right? He had a right to expect that he would never be molested by anyone. He had a right to live and I respectfully urge you that this is your opportunity to announce by your verdict that the remaining Edward Davises in Camden County can continue to expect those rights.

This is the decision that you are faced with. What about the other Edward Davises? This was murder, admitted murder in the first degree. This crime was shocking, bold, brazen and an unnecessary taking of life. This, and for the other reasons, merits that you give them the full measure of punishment. Do not compromise.

Please do not compromise. These defendants are guilty of murder in the first degree. They tell you they are guilty of murder in the first degree. These defendants are entitled to the death penalty. Do not compromise. If they are not guilty of murder in the first degree, entitled to the death penalty, then they ought to (1843) be acquitted.

On behalf of the decent citizens of our community, I beg

of you, ladies and gentlemen, don't dismiss murder. The law: Thou shalt not kill was contained in one of the Commandments which guides all of us. Do not indicate you have an indifference by a compromise. Is this the place to compron[illegible]. Are we around the Statesmen's table where we are talking about compromise? For whom are you compromising, for these hoodlums? Don't force us back to lawlessness, ladies and gentlemen.

Why should you compromise yourselves, the whole community's future and welfare for these three despicable criminals? Tell them and through them to everyone else who even has an idea to venture in this criminal business that crime does not pay.

(1844) Ladies and gentlemen, last week I told you that I as a Prosecutor of Camden County had a duty.

I took an oath to perform that duty and I intend to perform it.

I hope that you agree with me that I have discharged that duty with some credit to myself, but more important than that, with credit to the community who insisted on a fair trial by an impartial jury.

I hope that you agree with me that I have been fair to the State, and that I have even been fair to these defendants.

I believe in that.

Ladies and gentlemen, the law enforcement officers of the City of Camden, and the County of Camden, the County Detectives, and the City Detectives, did a most commendable job. I am really proud to have been associated with them.

Their vigilant investigation of this crime made it possible for these defendants to be brought to the bar of justice.

(1845) You have already gathered from the evidence, from the lips of the witnesses themselves, ladies and gen-

tlemen, that this took around-the-clock work, sleepless nights, in a dedication to duty.

The same applies to the preparation and trial of this case.

Now the time has arrived for you to do your duty.

I said to you, and you may recall, that duty oftentimes is unpleasant, and to do your duty requires courage.

I took an oath to perform the duty of my office to the best of my ability.

Each of you ladies and gentlemen of the jury took an oath to try this case and to render a true verdict, in accordance with the evidence of this case.

This is important, ladies and gentlemen.

This is an important case.

This is a serious case. Oh, I rest very complacently because I am confident (1846) that you can arrive at only one verdict, and that is guilty of murder in the first degree. Of this I have no doubt, but I say to you, do not exercise your right to make a recommendation for life imprisonment.

This is not because I am blood-thirsty, God is my judge, ladies and gentlemen. I ask this with all the sincerity in every fibre and tissue of my body.

I am pleading here for the principle of respect for our law.

I want, as I believe you want, a decent, peaceful community in which to live. I think you want it too.

This is where we want to rear our children and our children's children.

Is that asking too much? Is this wrong for me to ask it?

You all took an oath that you had no religious or conscientious scruples against capital punishment.

Each of you swore on an oath that you could return the death penalty against (1847) all three defendants, if the

evidence warranted it and the law, as given to you by the Court, would justify it.

When you answered in the affirmative to that oath, you all qualified as jurors.

(1848) MR. HEINE: The facts of this case, ladies and gentlemen, clearly warrant a verdict of murder in the first degree against all defendants, with punishment against all of them, equally, without recommendation.

I have no compunction in asking for this. I dare say that you might even be derelict in your duty if you don't agree. You might have been guilty of violating your oaths were you not to return such a verdict. I beg of you, on behalf of the State, that you return a verdict against all defendants of guilty of murder in the first degree, so that all defendants can receive the death penalty.

They were all in this together and they should stand in this together to the end.

Ladies and gentlemen, on behalf again of the State of New Jersey, on behalf of the citizens, of the decent people, the people that I believe you and I represent, I respectfully urge you to return a verdict (1849) of guilty of murder in the first degree, without any recommendation.

Keep in mind, ladies and gentlemen, you will not be sentencing to death, the law takes care of that without you. All I ask of you is for the decent people, for the good of our whole community, don't exercise your discretion, don't make such a recommendation.

Again, I leave you, and this for the last time, return a verdict against all three defendants, each of them guilty of murder in the first degree, without any recommendation.

I thank you.

Summation of Mr. Heine

THE COURT: Members of the jury, you have heard all the evidence, you have heard all of counsels' summations, the only thing remaining now is the charge to be given to you by the Court tomorrow.

Now, as I have warned you in the past, do not discuss this case, because until you know what the law is, and how the facts are to be applied to the law, you are (1850) not in a position to discuss it honestly, fairly and sensibly, so do not discuss it tonight, and tomorrow we will start at ten o'clock.

The jurors may be taken from the Court room first.

(Jurors leave the Court room.)

(Adjournment at 6:30 P. M. until Saturday, January 24, 1959, at 10 o'clock A. M.)

(1852) (The following is taking place out of the hearing of the jury.)

THE COURT: Gentlemen, Juror Grace Wheeler was taken ill and at the suggestion of defense counsel and the State, Dr. David was summoned. Dr. David has examined the Juror, Grace Wheeler. You have heard his report which, in substance, states that he feels she should be excused because she has a condition which might interfere with her proper execution of her duty as a juror.

Do you have any objection to her being excused?

MR. BERTMAN: No objection insofar as I am concerned.

MR. CAGGIANO: No objection, Your Honor.

MR. FLUHARTY: No objection.

MR. HEINE: No objection from the State.

THE COURT: Juror, Grace Wheeler, will be excused.
10 (1853) Doctor, thank you very much.

(The juror referred to is excused.)

(The jury is now brought into the Court room.)

(The jury is polled.)

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20 CHARGE OF THE COURT.

Members of the jury, it becomes my duty to instruct you as to the law which you must apply to the facts in this case.

These defendants, Sylvester Johnson, Stanley Cassidy and Wayne Godfrey, stand before you on an indictment found by the Grand Jury of this County, charging them with the crime of murder. The indictment is in statutory form, and you may bring it with you into the jury room
30 and there examine it. Presently I will explain the indictment to you and the law applicable to it. But before doing that, there are certain fundamental principles that I want to call to your attention, and which you should keep in mind and be guided by at all times during your deliberations.

You will realize, of course, that (1854) there are three defendants on trial before you. As I shall explain to you

in more detail later on, we are in effect trying three cases in one, and each defendant is entitled to your separate consideration and verdict. For that reason, except as I may otherwise specifically indicate, you will understand that the principles of law which I am about to explain to you apply severally and specifically to each defendant.

The Court is the judge of the law; the Court is the sole judge of the law. It is the function of the court to pass upon all questions of law arising in the trial and to inform the jury of the law governing the case.

And by reason of that rule, it is the duty of the jury to follow the law as it may be stated by the Court. On the other hand, the jury are the judges of the facts; the jury are the sole judges of the facts. The Court has no power to decide or to instruct the jury how to decide any (1855) question of fact, because the jury is the final and the only judge of the weight of the evidence, the credibility of the witnesses, the inferences to be drawn from the evidence, and of all inferences, issues, and questions of fact whatever, including the ultimate conclusion of guilty or not guilty, as well as the degree of guilt, if any, to be reached after the consideration of all of the evidence.

The Court has the right, and sometimes the duty, to comment on the evidence, but, if in so doing, the Court—and this goes as well for counsel—should state as its recollection of a fact something which does not coincide with the recollection of the jury, it is the duty of the jury to disregard those expressions of the Court, except where they completely coincide with the recollection of the jury. Or, if the Court in commenting on the evidence should appear to the jury to lay undue emphasis on any phase of the evidence, the jury should (1856) disregard such emphasis of the Court and remember that it is to decide the case not

only on the evidence referred to by the Court, but upon all of the evidence.

The Court has the right, if it sees fit, to express its opinion of the evidence, pointing out what evidence, conditions, or circumstances seem to the Court to be salient, controlling, or persuasive. And the Court has the right also to indicate any inferences or conclusions of fact which the Court would or may draw from the whole or any part of the evidence, but the jury are in no way bound thereby and may disregard all or any of such expressions or comments or opinions of the Court if they see fit to do so.

Now, the defendants in this case, and each of them, as are all defendants in all criminal cases, are presumed to be innocent, and unless the crime charged and the degree of crime charged and each and all of its elements are proved beyond a reasonable (1857) doubt, they, or any of them, are entitled to be acquitted. They cannot be convicted of any crime or degree of crime unless they are proved guilty thereof beyond a reasonable doubt. And the burden of proving the guilt of the defendants and the degree of their guilt beyond a reasonable doubt rests upon the State throughout the entire case and never shifts.

Reasonable doubt is not a mere possible or imaginary doubt because, as you may well know, everything relating to human affairs and depending upon oral testimony is open to some possible or imaginary doubt.

By a reasonable doubt is meant that state of the case which, after an entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

Reasonable doubt may arise also from a want of evidence or a lack of proof. (1858) And if you find that the State

has failed to produce evidence sufficient to satisfy you of the guilt of any or all of the defendants beyond a reasonable doubt, then he or they are entitled to an acquittal.

(1859) To revert to the indictment, I think if you will listen to me you will find that the law with respect to it is quite simple, and that you will have no difficulty understanding it. It charges in effect that the defendants, Sylvester Johnson, Stanley Cassidy and Wayne Godfrey, on the 24th day of January, 1958, in the City of Camden, did wilfully, feloniously, and with malice aforethought, kill and murder Edward J. Davis.

The finding of that indictment by the Grand Jury is no evidence of the guilt of the defendants. It is merely a step that is necessary in our regular course of criminal procedure so that they may be brought on for trial before a court such as this and a jury such as you for the determination of their guilt or innocence, and the degree of guilt, if any.

The indictment, as I have said, is in statutory form, which form is required in all indictments which charge the crime of murder. In order to understand its purport, I must explain to you the statutes which define murder, and by which statutes this indictment is governed.

(1860) Our statute respecting murder provides in part as follows: "If any person, in attempting to commit robbery, or any unlawful act against the peace of this State, of which the probable consequences may be bloodshed, shall kill another, then such person so killing as aforesaid shall be guilty of murder."

The statute further provides: "Murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in perpetrating or at-

tempting to perpetrate robbery shall be murder in the first degree."

In connection with murder in the first degree our statute further provides that every person convicted of murder in the first degree shall suffer death unless the jury, by their verdict and as a part thereof, upon and after a consideration of all of the evidence, recommends imprisonment for life, in which case this, and no greater punishment, shall be imposed.

So far as the guilt of the defendants (1861) in this case is concerned, the State does not contend that it is a case of murder perpetrated by means of poison or by lying in wait, or by any other kind of wilful and premeditated killing. The State contends that this case is controlled by that part of the statute which provides that any killing which shall be committed in attempting to perpetrate robbery, shall be murder in the first degree. I shall therefore explain to you the law applicable to a homicide alleged to have been committed in the attempted perpetration of a robbery, which is the portion of the statute which applies to this case.

Robbery is defined as the intentional stealing of property with violence from the person or personal custody of another person. It is necessary, in order to constitute that crime, that the goods shall be on the person of the owner, or the owner's agent, or shall be in his presence and in his custody.

An attempt to commit the crime intended is not complete until the actors perform some overt act directly moving towards commission of the (1862) crime, which overt act must be such as will apparently result in the usual and natural course of events in commission of the crime itself if not hindered by extraneous causes.

Charge of the Court

If you find beyond a reasonable doubt from a consideration of all the evidence in this case that the defendants did intentionally attempt to commit a robbery upon the deceased, Edward J. Davis, and that the defendants in attempting to commit the robbery as aforesaid did kill him, then the defendants are guilty of murder in the first degree.

(1863) You will note that the statute makes no mention of the element of the intention to kill in connection with a killing which shall be committed in attempting to perpetrate a robbery. In cases where death ensues from the attempted commission of robbery, the attempted robbery is regarded as standing in the place of, or as the legal equivalent of, the willfulness, deliberation, and premeditation required under the statute, and therefore the State is not under a duty to prove willfulness, deliberation, and premeditation where it has proved that a killing has been committed during the attempted perpetration of a robbery, which is the contention of the State in this particular case.

In this case the State contends that all three defendants aided and abetted in the attempted robbery perpetrated upon Edward J. Davis. The State further contends that during the perpetration of the attempted robbery Edward J. Davis was shot (1864) and killed by the defendant Johnson. That contention of course raises the question of the criminal responsibility of the defendants Cassidy and Godfrey if you find beyond a reasonable doubt that they, or either of them, aided or abetted the attempted robbery.

Now, the law with respect to aiders and abettors is as follows: If two or more persons act in concert in committing a criminal offense such as the one here charged, all those who participate in the committing of the criminal offense are equally guilty of that offense regardless of what part each one took in the commission of the crime.

Consequently, if a killing is brought about by the actions of one of those involved in the hold-up, all are guilty of murder in the first degree regardless of what their participation may have been, and therefore in the eyes of the law as far as their guilt or innocence is concerned, it makes no difference that Stanley Cassidy (1865) did not fire the shot that killed Edward J. Davis, nor that Wayne Godfrey was not at the scene of the actual killing if you find beyond a reasonable doubt that either or both of them, as the case may be, aided and abetted in the planning of the robbery as I have explained that principle to you.

Therefore, a person who agrees with his confederate that a robbery is to be committed, and he acts as a lookout, or provides an automobile for the escape, who does so while the robbery is being attempted, is an essential actor in the plan, and in the crime, and such a person, the law says, is equally guilty with his confederates for a killing committed by them, or one of them, during the attempted robbery.

Intention to commit a robbery, however, is one of the essential elements of this case, and the burden is on the State to prove to you beyond a reasonable doubt that all defendants intended to participate in the robbery of Edward J. Davis, (1866) that they did join and participate in the plan to perpetrate the robbery and that in the course of the attempted robbery, one of the defendants fired the fatal shot, or shots, that killed Edward J. Davis.

I shall undertake to point up for you the contentions on either side and while I am doing this I want to again caution you to keep in mind what I said before, that you and not the Court are the sole judges of the facts. It is your recollection and not mine that controls.

As the evidence unfolded in this case certain facts seemed

not to be in serious dispute. There was evidence to indicate that on January 24, 1958, at approximately 6:00 P. M. a man about 55 years of age, named Edward J. Davis, maintained a toy store at 1731 Broadway in the City of Camden. He was seen running out of his store and was heard to shout "Help! I'm shot", he later fell to the sidewalk. Shortly thereafter he was taken in the emer- (1867) gency patrol wagon to the Cooper Hospital. He arrived at the Cooper Hospital at 6:18 P. M. and died at 6:55 P. M. the same night. He had in his possession cash in the amount of $294.24.

The County Physician stated that four bullets had passed through decedent's body and the bullet which passed through his left groin and through a section of his small bowel and then through his liver and right lung after which it went through the posterior wall of his chest was the cause of death. He testified that the cause of death was a hemorrhage due to a perforation of the liver and right lung. The physician said he was a very robust man approximately 5'7" in height and 200 plus pounds in weight.

The first clue which eventually resulted in the arrest of these three defendants came from a witness who, while waiting for a red traffic light to change at the intersection of Fourth and Ferry (1868) Avenue in Camden, observed an automobile, which was to his rear and proceeding in his direction, pass him on his left side and go through the red traffic signal. He noted the license number which he later gave to the police. He also observed that this car stopped and then started up again.

The police checked the license registration number and learned that the car was registered in the name of the defendant Wayne Godfrey. The defendant Wayne Godfrey was arrested on January 28, 1958. At the time of his arrest

he was in the company of a man named Noah Hamilton who testified for the State. The defendant Stanley Cassidy was subsequently arrested on January 29, 1958, at approximately 4:00 A. M. The defendant Sylvester Johnson was arrested in Newark, New Jersey, on the same day around 5:00 P. M. at the home of an uncle.

A witness named James Walker was called by the State who stated he was friend- (1869) ly with the defendant Wayne Godfrey and that on the night preceding the attempted holdup of the deceased, Edward J. Davis, the defendant Godfrey called at his home and asked to borrow a revolver which this witness owned. The witness stated he loaned the defendant Wayne Godfrey this .32 calibre revolver, which revolver it is conceded was the one used and resulted in the death of the victim, Edward J. Davis. This same gun was later returned to this witness by the defendant Godfrey. It was recovered by the police and is marked in evidence for your examination. When this witness was asked by the defense whether Godfrey gave him a reason for wanting to borrow the gun this witness said Godfrey wanted it for protection since a couple of fellows were bothering him.

Another witness called by the State related of a visit to his home by the defendant Stanley Cassidy who discussed with this witness as to whether the witness had found a place to keep a .25 calibre auto- (1870) matic which the witness owned and was concerned about its hiding place. This witness stated that when the defendant Cassidy left his home this automatic revolver was in Cassidy's possession. This automatic was given to the defendant Cassidy several days before the attempted robbery. The gun was returned by Cassidy to this witness on Friday night, January 24, 1958, at 7:00 or 8:00 P. M. The automatic was

recovered by the police through the cooperation of this witness. This gun had not been fired.

The witness Noah Hamilton, who was arrested with Wayne Godfrey, testified for the State. He stated that on the evening of January 24, 1958, around midnight he was with defendant Godfrey, and Godfrey asked him to purchase a newspaper and look for holdups and when this witness referred to a newspaper story of a shooting at Broadway and Ferry Avenue the defendant Godfrey said that was it. This witness recounts of meeting the defendant Godfrey on the (1871) day following the attempted holdup at which time Godfrey was driving his automobile and had as a passenger the defendant Cassidy. He entered the car and the three went to defendant Johnson's home where defendant Johnson entered the car and they drove to Newark where Johnson remained at a home of an uncle where he was subsequently arrested. This witness testified he observed a band aid on Johnson's finger and when he inquired how defendant Johnson felt, Johnson expressed a desire not to talk about it. This witness also related a conversation he had with defendant Godfrey six or eight weeks before, at which time Godfrey asked him if he wanted to make some money and suggested a holdup and made some reference to a toy store on Broadway.

On January 29, 1958, the defendants, Stanley Cassidy and Wayne Godfrey, gave a detailed account of their respective participation in the attempted robbery to the police. The defendant, Sylvester (1872) Johnson, on January 30, 1958, likewise gave a detailed statement of his participation in the attempted robbery. No claim is made that these statements were secured by force or violence but were voluntary on the part of each of them.

(1873) The weight to be accorded these statements is

for the sole determination of the jury. None of the defendants took the stand to deny their participation in the crime. Under our law, a defendant cannot be compelled to testify, but he is competent to testify, and he has a right to testify, and his failure to be a witness in his own behalf is no presumption of guilt and does not erase the presumption of innocence. The failure of the defendants to take the witness stand should not be considered as prejudicial in respect to your determination as to whether or not you should attach to your verdict the recommendation of life imprisonment, in case you, the jury, should find any of the defendants guilty of murder in the first degree. If any inculpatory or incriminating facts are testified to which concern the acts of that particular defendant which he could by his oath deny, his failure to testify in his own behalf raises an inference that he could not truthfully deny those inculpatory or incriminating facts.

The State contends that it has estab- (1874) lished beyond a reasonable doubt that these three defendants are guilty of murder in the first degree and that the circumstances do not warrant your returning a recommendation of life imprisonment.

In the closing arguments of counsel for all the defendants they made it clear that their objective is to obtain at your hands a recommendation for life imprisonment. This, of course, does not relieve the State of proving the guilt of these defendants beyond a reasonable doubt. The positions taken by the defendants and their counsel neither work toward or against their advantage. They must be judged by you on the evidence and that alone. But the positions taken point strongly toward that area of your deliberation which will be most important.

Now, members of the jury, what are the facts? That is

for you to decide, for you in your capacity as jurors are the sole, final, conclusive judges of the facts. Necessarily in your capacity as jurors you have the right to evaluate the demeanor of the witnesses as you (1875) listen to them, the manner in which they testify, to judge the comparative degrees of frankness of the witnesses and to draw reasonable inferences from the testimony you have heard. All these things fall peculiarly within your province as judges of the facts.

It is the duty of each juror, in your deliberation, to give careful attention and consideration to the views of his or her fellow jurors, and to discuss the facts with them. Each juror acts for himself or herself and must reach his or her own judgment after discussion of the facts with the other members of the jury.

Each juror must stand by and abide by his own belief formed in his or her mind from the whole of the evidence in each case. Each juror must reach a conclusion with respect to the guilt or innocence of each defendant. Your verdict in each case must be unanimous.

In the consideration of alleged statements of the three defendants, as I have cautioned you many times during the trial, and now instruct you, the statement made by any defendant is only (1876) evidential as to what he says he himself did, or said, not against any of the other defendants as to what he said such other defendant, or defendants, who didn't make the confession, did or said. I think we must by now understand each other upon this point.

Now, of course, during this lengthy trial, this Court was called upon many times to rule upon objections and motions made by both the State and the Defense. In ruling upon them I was deciding questions of law alone and whatever the ruling in any situation may have been, you will under-

stand that no expression on the merits of the case of the State or of the defense was intended or could properly have been intended. I hope I have made this thoroughly clear to you.

Under the evidence here the law requires your verdict to be one of guilty of murder in the first degree as to one, some, or all of the defendants, or a verdict of guilty of murder in the first degree with a recommendation of imprisonment for life as to one, some, or all of the defendants, or a verdict of not guilty as (1877) to one, some, or all of the defendants.

If you reach the conclusion that all or any of the defendants are guilty of murder in the first degree then you shall turn your attention to the portion of the statute to which I referred at the outset of my charge.

As I advised you, the law prescribes that all persons who are convicted of murder in the first degree shall suffer death unless the jury shall, by its verdict, and as a part thereof, upon and after consideration of all the evidence, recommend imprisonment for life, in which case this and no greater punishment shall be imposed.

This recommendation, contemplated by the statute, rests entirely and solely in your judgment and discretion after a consideration of all the evidence.

Let me say to you that no article which may have appeared in any newspaper or anything that you may have read or heard about this case, before your selection as a juror cannot and should not be considered by you in the determination of this case; that you also are to completely dis- (1878) regard and eliminate from your minds any and all questions, and answers and expression of opinions that you may have heard during the examination of the prospective jurors. You must, under your oath, disregard the

same and any other extraneous matters, and enter upon your deliberations in this case solely and entirely upon the testimony presented to you in court and the law given to you by the Court for your guidance in applying the law to the facts as you find the facts to be.

You must not allow passion, prejudice or partiality to enter into your deliberation. Both the State and the defendants expect and expect justly that you will decide this case solely on evidence and in accordance with the law that I have given to you.

(1879) You will keep in mind in your deliberations in this case that there are three defendants on trial and that they are to be judged separately by you. Each defendant stands alone in so far as guilt or innocence or punishment is concerned, and the guilt or innocence or punishment of any one of them does not affect the guilt or innocence or punishment of the other defendants.

Now, a word as to the form of your verdict, which must be a unanimous verdict of the jury.

You must remember that three defendants, Sylvester Johnson, Stanley Cassidy and Wayne Godfrey, are standing trial. Therefore the form of your verdict should be as follows, it being understood that your verdict as to each defendant, whatever it may be, shall be in all respects the unanimous verdict of the jury. Here is the form: We find the defendant Sylvester Johnson guilty of murder in the first degree, and you could stop there; or we find the defendant Sylvester Johnson guilty of murder in the first degree with a recommendation of life imprisonment and stop there, or we find (1880) Sylvester Johnson not guilty.

Then as to Stanley Cassidy, the same. This is the form: We find the defendant Stanley Cassidy guilty of murder in the first degree, and stop there; or we find the defendant

Stanley Cassidy guilty of murder in the first degree with a recommendation of life imprisonment; or we find Stanley Cassidy not guilty.

And the same as to Wayne Godfrey: We find the defendant Wayne Godfrey guilty of murder in the first degree, and stop there; or we find the defendant Wayne Godfrey guilty of murder in the first degree with a recommendation of life imprisonment; or we find Wayne Godfrey not guilty.

(1881) Now, I will ask that the jury be taken in the corridor. I want to pass upon motions. You are not going to deliberate yet, I will call you back before that.

(Jury leaves the court room.)

THE COURT: Gentlemen, I will now pass upon these requests for instructions after which you may take your exceptions.

As to the defendant, Sylvester Johnson, I have refused to charge one, two, three, four and five, because I feel I have in substance covered them. I have refused to charge six and seven, eight and nine.

As to the defendant, Wayne Godfrey I refuse to charge one, two, three, four, five, six and seven, because I feel I have in substance covered those. I have charged eight.

MR. FLUHARTY: Yes.

May the record show my exception to the seven that were refused to be charged.

MR. BERTMAN: May the record show my exception by Sylvester Johnson to the Court's refusal to charge those requested.

Discussion

(1882) THE COURT: There being nothing further for the record, the Clerk will put the thirteen names in the box and call the first twelve.

MR. HEINE: If your Honor pleases, would you want to call for any objections to the charge?

THE COURT: I did. They have no objection to my charge. They object to my refusal to charge.

MR. HEINE: I didn't hear that they had no objection to your charge.

THE COURT: They didn't take any exception to my charge.

MR. CAGGIANO: No objection to your charge, however, as to Stanley Cassidy, we make the same objections as made by the other defendants.

MR. BERTMAN: No objection to the charge as stated but objections to the refusal to request as given to your Honor.

MR. FLUHARTY: As to the defendant, Godfrey, no objection to the charge as given but only objects to the refusal to charge the previous seven requests as mentioned.

MR. CAGGIANO: And Stanley Cassidy is (1883) the same.

THE COURT: Here, Mr. Stenographer, these requests to charge were given to me in ink, and they were handed

to me this morning. I feel they should be typed into the record.

Proceed with the selection of the jury.

(A panel jury of twelve was selected.)

THE COURT: Members of the jury, under the law the first person selected at this calling is the foreman. I have to call her forelady. Mrs. Gaskill, you are the forelady of this jury.

Supposing we call the names of the jurors in the box and see that we have the correct ones in there.

(Roll call of the jury.)

THE COURT: The attendants will be sworn, the jury attendants.

(The jury attendants were sworn.)

THE COURT: Have all exhibits been checked, gentlemen?

MR. HEINE: We checked them yesterday.

THE COURT: Supposing you take the jury, then come back for the exhibits. Supposing you (1884) take the jury out and they will all be ready for you.

(Jury leaves the court room at 12:12 P. M. to deliberate.)

THE COURT: The defendants may be taken from the court room at this time.

Requests for Instructions Defendant, Wayne Godfrey, by E. Stevenson Fluharty, Attorney

REQUESTS FOR INSTRUCTIONS DEFENDANT, WAYNE GODFREY, BY E. STEVENSON FLUHARTY, ATTY.

1. Ladies and gentlemen of the jury, you have the duty to determine what the defendant, Wayne Godfrey's punishment shall be if you find him guilty of murder in the first degree. After an examination of all the evidence you may, as part of your verdict, recommend life imprisonment at hard labor, in which event this shall be his punishment. If you fail to make such a recommendation his punishment shall be death. Before you return a verdict, if you do, of guilty of murder in the first degree you must unanimously agree as to the punishment to be imposed.

2. Ladies and gentlemen of the jury, if you should find the defendant, Wayne Godfrey, guilty of murder in the first degree, you have the duty to determine, within the limits fixed by law, what his punishment shall be: you are the final arbiters of the punishment, the choice is yours and this choice you must make. The matter rests entirely and solely in your judgment and in your discretion after a consideration of all the evidence. State vs. Cooper, 67 A. 2 298—State vs. Bunk, 73 A. 2 249.

3. Ladies and gentlemen, before you can return a verdict of guilty of murder in the first degree against the defendant, Wayne Godfrey, you must unanimously agree on the punishment. If your verdict does not carry with it a recommendation for life imprisonment at hard labor you must

Requests for Instructions Defendant, Wayne Godfrey, by E. Stevenson Fluharty, Attorney

all agree that your verdict will not contain as a part thereof, a recommendation for life imprisonment at hard labor. Until you have unanimously agreed upon the punishment to be imposed, a verdict of guilty of murder in the first degree may not be returned.

4. Ladies and gentlemen, you have heard three separate cases and you must determine the guilt or innocence of each defendant separately. You need not return the same verdict for each defendant. If you should, by chance, find all three defendants guilty of murder in the first degree you need not impose the same punishment upon all three. You may make a recommendation of life imprisonment at hard labor for one and not the other two; you may make a recommendation of life imprisonment at hard labor for two and not the third or you may make a recommendation of life imprisonment at hard labor for all three.

5. Each juror acts for himself or herself and must rely on his or her own judgment after discussion of the facts with the others. If after such discussion and deliberation, a juror entertains a different view as to the punishment that should be imposed from that of the others he or she should not agree to a verdict that is contrary to his own view.

6. You the jury must base your verdict on the evidence, however, you may exercise your own judgment and discretion based upon your personal experience in applying the general rules of law to the details of the question before you.

Requests for Instructions

7. Ladies and gentlemen, before you may return a verdict that would impose the death penalty upon Wayne Godfrey, you must all agree that he is to suffer the death penalty.

8. The failure of the defendants to take the witness stand should not be considered as prejudicial in respect to your determination as to whether or not you should attach to your verdict a recommendation of life imprisonment in case you the jury should find any of the defendants guilty of murder in the first degree. State vs. Gimbel, 151 A. 756.

NOTE: This request to follow any charge with respect to the defendants failure to take the witness stand and testify.

REQUESTS FOR INSTRUCTIONS.

IT IS NOW RESPECTFULLY REQUESTED THAT THE COURT INSTRUCT THE JURY AS FOLLOWS:

1. It is not mandatory for you to sentence the defendants or any one of them to first degree murder carrying with it the penalty of death after you have considered all the evidence.

2. It is not mandatory for you to sentence the defendants or any one of them to the death penalty if you do not find any mitigating or extenuating circumstances after having considered all of the evidence.

Requests for Instructions

3. If you find Sylvester Johnson guilty of murder in the first degree, you cannot sentence him to death by virtue of the lone fact that Sylvester Johnson did the actual shooting. Before reaching your verdict as to the penalty imposed upon Sylvester Johnson, you must consider all the evidence.

4. In no event are you required to impose the death penalty upon these defendants or any one of them, if you find them guilty of murder in the first degree. You must consider all the evidence in determining the penalty to be imposed.

5. The failure of the defendants to take the witness stand should not be considered as prejudicial in respect to your determination as to whether or not you should attach to your verdict a recommendation of life imprisonment in case that you, the jury, should find any of the defendants guilty of murder in the first degree. State vs. Gimbel, 107 N. J. L. 235; 151 A. 756.

6. Inasmuch as the State has failed to produce legal or competent evidence that a robbery or felony took place, you cannot find the defendants guilty of anything higher than murder in the second degree.

7. If you find the State has failed to produce evidence that a robbery or felony took place, you cannot find defendants guilty of anything higher than murder in the second degree.

8. The prosecutor in his summation stated the jury would be violating their oath as jurors if they brought in a verdict recommending life imprisonment.

Requests for Instructions

I ask the Court to charge "It would not be a violation of their oath if they brought in a verdict of first degree murder with a recommendation of life imprisonment and it is not mandatory to sentence anyone of the defendants to death."

9. In view of statements by the Prosecutor in his summation that the defendants did not take the stand to say they were sorry and other comments by the Prosecutor in his summation in relation to the defendants' failure to take the stand which comments should have been limited to the fact that the failure of the defendants to take the stand raises an inference that the defendants could not truthfully deny inculpatory or incriminating facts, which when in fact the comments of the Prosecutor went beyond that limitation, I ask the Court to charge "The failure of the defendants to take the stand should not be considered as prejudicial in your determination as to whether or not you should attach to your verdict a recommendation of life imprisonment in case that you the jury should find any of the defendants guilty of murder in the first degree."

/s/ ELMER BERTMAN,
Attorney for Defendant,
Sylvester Johnson.

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[fol. 344] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 345] IN THE SUPREME COURT OF NEW JERSEY

A-60 September Term 1964

Number 3278

STATE OF NEW JERSEY, Respondent,

vs.

SYLVESTER JOHNSON AND STANLEY CASSIDY, Appellants.

Argued November 16, 1964.

Mr. M. Gene Haeberle argued the cause for the Appellants. (*Messrs. Curtis R. Reitz and Stanford Shmukler*, both of the Pennsylvania Bar, and *Mr. M. Gene Haeberle*, on the brief.)

Mr. Norman Heine, Camden County Prosecutor, argued the cause for the Respondent.

OPINION—Decided January 19, 1965

The opinion of the court was delivered by PROCTOR, J.

The defendants, Sylvester Johnson and Stanley Cassidy, together with Wayne Godfrey, were tried in January 1959 for felony murder. The jury found them guilty of murder in the first degree without recommendation of life imprisonment, and the court sentenced them to death. This court affirmed the convictions, *State* v. *Johnson*, 31 *N.J.* 489 (1960), and a number of post-conviction applications followed.[1]

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[1] This is the fifth application of the defendants Sylvester Johnson and Stanley Cassidy for post-conviction relief which has been considered by this court. *State* v. *Johnson*, 63 *N.J.Super.* 16 (*Law Div.* 1960), *affirmed* 34 *N.J.* 212 (1961), *appeal dismissed* 368 *U.S.* 145, 7 *L.Ed.* 2*d* 188, *cert. denied* 368 *U.S.* 933, 7 *L.Ed* 2*d* 195 (1961); *State* v. *Johnson*, 71 *N.J.Super.* 506 (*Law Div.* 1962), *affirmed* 37 *N.J.* 19

[fol. 346] This appeal by Johnson and Cassidy is from the most recent trial court denial of their application for post-conviction relief. The trial court refused the defendants' request for a full evidentiary hearing and denied them relief after hearing oral argument only. On their appeal to this court, defendants submitted affidavits in support of their grounds for relief. For the purpose of this appeal, we will consider the affidavits as if they were offered for the trial court's consideration.

I

At the trial the evidence against the defendants and Godfrey included their confessions given to the police shortly after they were apprehended. The affidavits submitted by the defendants on their present application allege, *inter alia*, that prior to, and at the time they confessed, they were subjected to physical and mental coercion and were held incommunicado. These allegations were not made at the trial or on their direct appeal to this court. See *State* v. *Johnson*, *supra*, 31 *N.J.* at 502. The allegations of physical and mental coercion were raised, however, on their first motion for post-conviction relief. The trial court and this court found that the defendants' stories were unbelievable and that there was no reasonable basis to say the confessions were involuntary. *State* v. *Johnson*, 63 *N.J.Super.* 16, 42-43 (*Law Div.* 1960), *affirmed* 34 *N.J.* 212, 223, 228 (1961). These allegations and the allegation that they were held incommunicado go to the issue of voluntariness. As that issue has been fully litigated and decided against the defendants, it may not be raised again. *State* v.

(1962), *cert. denied* 370 *U.S.* 928, 8 *L.Ed.2d* 508 (1962); *State* v. *Johnson*, 37 *N.J.* 326 (1962); *Johnson* v. *Yeager*, 38 *N.J.* 319 (1962). See also *United States ex rel. Johnson* v. *Yeager*, 327 *F.2d* 311 (*3rd Cir.* 1964), *cert. denied* *U.S.* , 12 *L.Ed.2d* 751 (1964); *United States ex rel. Johnson* v. *Yeager*, 327 *F.2d* 320 (*3rd Cir.* 1964). Additionally, prior to their trial, defendants moved, *inter alia*, for an order allowing them to inspect their confessions. As a result of our opinion in *State* v. *Johnson*, 28 *N.J.* 133 (1958), the defendants were granted permission to examine their confessions.

(*Edgar*) *Smith*, 43 *N.J.* 67, 74 (1964); *R.R.* 3:10A-5. In-[fol. 347] deed, the question of voluntariness has been fully litigated and determined against Johnson and Cassidy in the federal courts. *United States ex rel. Johnson* v. *Yeager*, 327 *F.* 2*d* 311, 316-19 (3*rd Cir.* 1964), *cert. denied* *U.S.* , 12 *L.Ed.* 2*d* 751 (1964). Godfrey's confession, however, was held to be unvoluntary.[2] 327 *F.* 2*d* at 313-16, *cert. denied*, *New Jersey* v. *Godfrey*, *U.S.* , 12 *L.Ed.* 2*d* 745 (1964).

The affidavits further allege that during their interrogation, the defendants asked for and were denied an opportunity to consult with an attorney and were not advised of their right to remain silent.[3] These allegations were not made in any of the prior proceedings, nor in their present petitions to the trial court. The defendants made these allegations for the first time in their affidavits submitted to this court. Denial of an opportunity to consult with an attorney and failure to be advised of the right to remain silent are factors relevant to the issue of voluntariness. *State* v. *Grillo*, 11 *N.J.* 173, 180-81 (1952); *State* v. *Pierce*, 4 *N.J.* 252, 262 (1950). See *Cicenia* v. *LaGay*, 357 *U.S.* 504, 509, 2 *L.Ed.* 2*d* 1523, 1528 (1958). If these allegations are made on that issue, our consideration is precluded by our prior judgment. *State* v. (*Edgar*) *Smith*, *supra*; *R.R.* 3:10A-5.

[fol. 348]

II

The defendants, relying upon *Escobedo* v. *Illinois*, *U.S.* , 12 *L.Ed.* 2*d* 977 (1964), apparently contend that entirely apart from the issue of voluntariness, the alleged denial of an opportunity to consult with counsel, and the failure of the police to advise them of their right to remain

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[2] On Godfrey's first application for post-conviction relief, the trial court and this court fully considered Godfrey's new story, which attempted to establish the involuntariness of his confession, and found it to be unbelievable. *State* v. *Johnson*, *supra*, 63 *N.J.Super.* at 42-43, *affirmed* 34 *N.J.* at 223, 228.

[3] The police interrogator informed the defendants that anything they told him must be of their own free will and could be used against them.

silent prior to their confessions, invalidate their convictions. *Escobedo* was decided by the United States Supreme Court on June 22, 1964, which, of course, was later than their convictions and appeal, and their previous applications for post-conviction relief. That decision held inadmissible at a defendant's subsequent criminal trial a statement elicited from him by the police under the following circumstances: Escobedo was arrested and interrogated by the police concerning the murder of his brother-in-law. He made no statement and a lawyer whom he had engaged obtained his release pursuant to a writ of habeas corpus. Eleven days later, the police again arrested Escobedo and told him that one DiGerlando had named him as the murderer. The police took Escobedo to police headquarters where they interrogated him for a number of hours. The police denied his repeated requests to consult with his lawyer, and never advised him of his constitutional rights. During the interrogation, Escobedo's lawyer arrived at the police station, but his repeated requests to see his client were denied. The court held that in the combination of circumstances—the suspect had been taken into custody, the interrogation had turned from investigatory to accusatory, the suspect's repeated requests for an opportunity to consult with his lawyer, and his lawyer's repeated requests to consult with him had been denied, and the suspect had not been warned of his right to remain silent—the accused [fol. 349] had been denied the assistance of counsel in violation of the Sixth Amendment as made obligatory upon the states by the Fourteenth Amendment.

Only one year before the trial of defendants' case, and six years before *Escobedo*, the United States Supreme Court, in *Crooker* v. *California*, 357 *U.S.* 433, 2 *L.Ed.2d* 1448 (1958), and *Cicenia* v. *LaGay*, *supra*, 357 *U.S.* 504, 2 *L.Ed.2d* 1523 (1958), expressly rejected the contention that every accused has a constitutional right to consult with counsel during police interrogation.[4] This was the prevailing law

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[4] See also *Culombe* v. *Connecticut*, 367 *U.S.* 568, 589 to 591, 6 *L.Ed.2d* 1037, 1050 to 1052 (1961), where Justice Frankfurter stated.

"[T]his Court (in cases coming here from the lower federal courts), the courts of England and of Canada,

not only at the times of defendants' trial and direct appeal, but also at the times of their previous applications for post-convication relief. The facts in *Cicenia* are so similar to those in *Escobedo* that it would be unreasonable to conclude that *Escobedo* did not overrule *Cicenia*. Assuming that the allegations contained in defendants' affidavits are within the principle announced by *Escobedo* (an assumption which we regard as unsound), and assuming for present purposes that *Escobedo* stands for a new rule of constitutional law [fol. 350] which does not depend on voluntariness, the question is whether that rule should be applied to the convictions of the defendants even though their trial, its affirmance on appeal, and the disposition of their previous applications for post-conviction relief antedated *Escobedo*.

The defendants, in support of their argument for retroactive application of Escobedo to their convictions, cite *Gideon* v. *Wainwright*, 372 *U.S.* 335, 9 *L.Ed2d* 799 (1963). *Gideon* was a federal habeas corpus proceeding which invalidated a state criminal conviction where the indigent defendant had been denied the right to have an attorney represent him at his trial. It held that every defendant is constitutionally entitled to the assistance of counsel at his trial. Defendants contend that since *Gideon* was a right to counsel case and has generally been given retroactive effect,[5] *Escobedo*, which also turns on the right to counsel, therefore must likewise be given retroactive effect.

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and the courts of all the States have agreed in holding permissible the receipt of confessions secured by the questioning of suspects in custody by crime-detection officials. And, in a long series of cases, this Court has held that the Fourteenth Amendment does not prohibit a State from such detention and examination of a suspect as, under all the circumstances, is found not to be coercive."

[5] See, *e.g.*, *Doughty* v. *Maxwell*, 376 *U.S.* 202, 11 *L.Ed.2d* 650 (1964); *United States ex rel. Durocher* v. *LaVallee*, 330 *F.2d* 303 (2*d Cir.* 1964), *cert. denied*, *LaVallee* v. *Durocher*, 377 *U.S.* 998, 12 *L.Ed.2d* 1048 (1964); *Craig* v. *Meyers*, 329 *F.2d* 856 (3*rd Cir.* 1964); *Palumbo* v. *New Jersey*, 334 *F.2d* 524 (3*rd Cir.* 1964). But see *Commonwealth* v. *Bamiller*, 410*Pa.*584, 189 *A.2d* 875 (1963).

There are, however, several factors which distinguish *Gideon* from *Escobedo*. First, *Gideon* itself was a collateral attack while *Escobedo* was a direct appeal. Second, the opinion in *Escobedo* does not indicate whether the court intended retroactive application. Unlike the treatment of *Betts* v. *Brady*, 316 *U.S.* 455, 86 *L.Ed.* 1595 (1942), in *Gideon*, which overruled that case, there is not the slightest intimation in *Escobedo* that either *Cicenia* or *Crooker* was an "abrupt break with its own well-considered precedents," see *Gideon* at 344, 9 *L.Ed.2d* at 805; or "departed from the [fol. 351] sound wisdom upon which the Court's holding in *Powell* v. *Alabama* rested," *Id.* at 345, 9 *L.Ed.2d* at 806; or was " 'an anachronism when handed down,' ". *Ibid.* Unlike *Mapp* v. *Ohio*, 367 *U.S.* 643, 6 *L.Ed.2d* 1081 (1961), there is no language in the court's opinion in *Escobedo* which provides ammunition for arguing whether retroactive effect was intended. For discussion of the arguments on either side, see Bender, The *Retroactive Effect of An Overruling Constitutional Decision: Mapp* v. *Ohio*, 110 *U.Pa.L. Rev.* 650, 668-73 (1962). And unlike *Griffin* v. *Illinois*, 351 *U.S.* 12, 100 *L.Ed.* 891 (1956), *Escobedo* does not contain a concurring opinion indicating that the majority intended retroactive application. See Justice Frankfurter, concurring, *Id.* at 20, 100 *L.Ed.* at 900. *Third*, no subsequent adjudication by the Supreme Court nor any other court has come to our attention which reveals whether *Escobedo* was intended to be applied retroactively. As noted above, *Gideon* has been given retroactive application in a number of cases. *Griffin* was applied retroactively in *Eskridge* v. *Washington State Board*, 357 *U.S.* 214, 2 *L.Ed.2d* 1269 (1958).

There is nothing in the Constitution itself which compels the automatic and general application of every new rule of law to invalidate decisions already finally rendered. See *Chicot Co. Drainage Dist.* v. *Baxter State Bank*, 308 *U.S.* 371, 374-75, 84 *L.Ed.* 329, 333 (1939); *Sisk* v. *Lane*, 331 *F.2d* 235, 239 (*7th Cir.* 1964); *United States ex rel. Linkletter* v. *Walker*, 323 *F.2d* 11, 14 (*5th Circ.*1963); see also Bender, *supra*, 110 *U.Pa.L.Rev.* at 671 (1962); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 *Yale L. J.* 907 (1962); Note, *Collateral Attack of Pre-Mapp* v. *Ohio Convictions Based on Illegally Ob-*

tained Evidence in State Courts, 16 *Rutgers L. Rev.* 587, 588-91 (1962).

[fol. 352] Perhaps, years ago, there was a philosophical compulsion to apply a new ruling retrospectively. The so-called Blackstonian conception of the nature of law and judicial decision-making was that law was perpetual and immutable. Judges were thought to be the discoverers rather than the creators of the law. Thus, a given decision was merely an evidence of the law; the most recent decision being the most authoritative evidence. An overruled holding was not bad law, it was simply never the law. See Levy, *Realist Jurisprudence and Prospective Overruling*, 109 *U.Pa.L.Rev.* 1, 2 (1960); Note, *supra,* 71 *Yale L.J.* at 908.

Whatever the past status of the above philosophy, it has been recently characterized as a "splendid myth." *United States ex rel. Durocher* v. *LaVallee,* 330 *F.2d* 303, 312 (1964); see also *Gaitan* v. *United States,* 317 *F.2d* 494, 497 (10*th Cir.*1963) *United States ex rel. Angelet* v. *Fay,* 333 *F.2d* 12, 16 (2*d Cir*), *cert. granted* *U.S.* , 13 *L.Ed.2d* 28 (1964); Levy, *supra,* 109 *U.Pa.L.Rev.* 1. See also Justice Frankfurter's concurring opinion in *Griffin* v. *Illinois, supra.*

It is now recognized that judicial decision making is often creative and requires that judges, although in a strictly limited sense, "legislate." See *Cardozo, The Nature of the Judicial Process,* 124-132 (1921); Clark and Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition,* 71 *Yale L. J.* 255, 275-76 (1961); Weintraub, *Judicial Legislation,* 81 *N.J.L.J.* 545 (1958); Levy, *supra,* 109 *U.Pa.L.Rev.* at 28. Thus, contemporary judicial decisions announcing a new rule of law are the the product, not only of a reevaluation of abstract prin-[fol. 353] ciples of justice but also of practical considerations of current economic, social, and political realities, and the effect of the rules announced in those decisions upon current institutions. Constitutional law is no exception.[6]

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[6] Indeed, it has been said that unlike ordinary law which can feasibly be corrected by legislation, constitutional decisions should be more closely attuned to the changing social order. See Bodenheimer, *Book Review,* 64 *Colum.L.Rev.* 1563, 1564 (1964).

See, *e.g.*, *Brown* v. *Board of Education of Topeka*, 347 *U.S.* 483, 98 *L.Ed.* 873 (1954). In determining whether to give retroactive effect to a new rule of law, a court's consideration should be correspondingly broad. As Justice Cardozo said:

> "I feel assured, however, that [the extent of retrospective application of a new rule,] wherever it shall be, will be governed, not by metaphysical conceptions of the nature of judge-made law, nor by the fetich of some implacable tenet, such as that of the division of governmental powers, but by consideration of convenience, of utility, and of the deepest sentiments of justice." *Cardozo, supra,* at 148-49.

Retroactive application of any new rule will cause some degree of inconvenience in the administration of justice. Society does have an interest in preventing its courts from being burdened with a flood of relitigation. See Note, *supra*, 16 *Rutgers L. Rev.* at 592. Furthermore, retroactive application of a new rule of law undermines the authoritative nature of final judicial decisions. Society reasonably expects that when a man is convicted of a crime by a method not considered unfair according to the rules of law then in effect, that conviction will stand. Therefore, unless some countervailing considerations of "the deepest sentiments of justice" compel otherwise, a new rule of criminal law should not be applied retroactively.

[fol. 354] While *Gideon* and *Escobedo* may both turn on the right to counsel as guaranteed by the Sixth Amendment, the effect of and justification for retroactive application in *Gideon* is fundamentally different from *Escobedo*. When *Gideon* overruled *Betts* v. *Brady*, only a few states still denied counsel to the accused in a trial in a non-capital criminal case. See Israel, *Gideon* v. *Wainwright*: *The "Art of Overruling*, *The Supreme Court Review*, 211, 267 (1963). But at the time *Escobedo* was decided, almost all the states permitted the introduction of voluntary confessions given, in the absence of counsel, during police investigation. Therefore, if *Escobedo* should be held to mean that the suspect must be furnished counsel during police investigation unless he affirmatively waives his right to counsel, then it is probable that the retroactive application of

Escobedo would invalidate far more convictions throughout the country than *Gideon*.

But turning to our "deepest sentiments of justice," in Justice Cardozo's phrase, there is a factor of paramount significance which distinguishes the retroactive effect of *Gideon* from *Escobedo*. Where a defendant in a crimnial trial was denied the assistance of counsel, abiding doubts arise as to whether the judicial procedure accurately ascertained the real culprit, see *Lewis, Gideon's Trumpet* (1964); whether the act done constituted the crime charged, see *United States ex rel. Durocher* v. *LaVallee, supra, at* 308 or whether the act done was a crime at all, see *Carnley* v. *Cochran*, 369 *U.S.* 506, 508-10, 8 *L.Ed.2d* 70, 73-74 (1962). In short, Gideon expresses judicial realization that denial of counsel during judicial procedings has the clear capacity to result in the conviction of a guiltless man:

> [fol. 355] "'Without [the assistance of counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.'" *Gideon, supra*, at 345, 9 *L.Ed.2d* at 805-6.

Gideon thus challenges the reliability of the judicial determination of guilt.[7] *Griffin* v. *Illinois, supra*, similarly challenges the reliability of the guilt-determining process. There it was held to be a violation of the Fourteenth Amendment to deny a defendant appellate review solely on account of his inability to pay for a transcript.

Where the reliability of the guilt-determining process is seriously impugned, there is good reason for applying the new rule to a case already decided. It would offend our sense of justice to continue to incarcerate a convicted man where subsequent considerations cast grave doubts upon the reliability of the determination of his guilt. But where the conviction was obtained as a result of a procedure not considered fundamentally unfair at that time,[8] and sub-

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[7] In *State* v. *(James) Smith*, 37 *N.J.* 481, 484 (1962) Chief Justice Weintraub referred to the same thought as the "truth of the conviction."

[8] Thus, cases such as *Pennsylvania* v. *Claudy*, 350 *U.S.* 116, 100 *L.Ed.* 126 (1956) are distinguishable. There the petitioner for post-conviction relief alleged facts, never

sequent judicial decisions cast no substantial doubts upon the reliability of the determination already made, no compelling reason exists for disturbing a decision no longer subject to direct appeal.

At the time of the defendants' trial, voluntariness of a confession was the criterion for its admission in evidence. See *Grillo, supra,* and *Pierce, supra.* Further, to fortify the reliability of a voluntary confession, independent corroborative evidence was required to sustain a conviction. [fol. 356] *State* v. *Lucas,* 30 *N.J.* 37, 56 (1959); *State* v. *Johnson, supra,* 31 *N.J.* at 502. These two requirements still assure that the issue of guilt was reliably determined.

The case before us amply illustrates the point: On January 24, 1958, Edward Davis, while conducting business in his toy store in Camden, was shot four times resulting in his death. Witnesses identified Godfrey's automobile leaving the vicinity of the crime and shortly thereafter the defendants and Godfrey were apprehended by the police. The defendants and Godfrey all confessed that they had planned to rob Davis' store; that they had borrowed guns for Johnson and Cassidy to use in the holdup; and that Godfrey drove his automobile and waited near the store while Johnson and Cassidy went in to rob Davis. Johnson and Cassidy confessed that when they attempted to hold up Davis, Davis tussled with Johnson and Johnson fired at him a number of times, and that Johnson's finger was cut. They then fled the store, and rejoined Godfrey, who drove them home. The defendants' confessions were not given in the presence of each other yet were essentially identical.

At the trial these confessions were introduced into evidence. At the request of the defendants and Godfrey, the hearing on the voluntariness of the confessions was conducted by the trial judge out of the presence of the jury. The State produced evidence to show that the confessions were voluntarily given. The defendants did not take the stand. Nor did they offer any other evidence in rebuttal. After the trial court found that the confessions were voluntary and therefore admissible, the prosecutor expressed his

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before raised in a judicial proceeding, which would have entitled him to relief under the due process standards existing at the time of his conviction if raised at that time.

intention to produce the same evidence of voluntariness [fol. 357] for the jury's consideration.[9] But defendants informed the court that the confessions could be read to the jury without any testimony on the issue of voluntariness since they were "satisfied not to go through it again."

The confessions were read to the jury. The State also introduced evidence which corroborated many of the details contained in the defendants' confessions. See *State* v. *Johnson, supra,* 31 *N.J.* at 494-501. Included in the State's evidence were the guns used by Johnson and Cassidy. The State proved that the gun Johnson confessed to using had in fact fired the fatal shots. Further, a witness testified that Johnson told him on the day following the shooting that he had hurt his finger tussling with the proprietor of the toy store. In his summation, Johnson's counsel told the jury that Johnson had had no opportunity to learn what his co-defendants had confessed to and that his confession was "truthful and honest." Cassidy's counsel, in his summation, told the jury that the confessions made by Cassidy were true, as he and Cassidy had been over them "many, many times." Both counsel conceded their clients' guilt but pleaded with the jury not to impose the death penalty.

Unlike *Gideon,* the rule of law which the defendants contend *Escobedo* announces does not raise substantial doubt [fol. 358] as to the reliability of the determination of guilt.[10]

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[9] Under the New Jersey procedure for the admission in evidence of a confession, the trial judge must first determine whether the confession was voluntary. If he finds the confession to be voluntary, and hence admissible, he instructs the jury to also consider the voluntariness of the confession and to disregard it unless the State proves it was voluntarily given. *State* v. *La Pierre,* 39 *N.J.* 156, 162-63 (1963). This procedure conforms to the constitutional requirements of *Jackson* v. *Denno,* ___ *U.S.* ___ 12 *L.Ed.2d* 908 (1964).

[10] This distinction has been recognized by Judge Irving R. Kaufman of the Second Circuit Court of Appeals in a recent article. *The Uncertain Criminal Law, The Atlantic,* January, 1965, *pp.* 61, 62-64.

Therefore, we will not apply that rule to the prior convictions of Johnson and Cassidy.

The purpose of a rule calculated to prevent police interrogation, without the presence of counsel, of a suspect accused of a crime is more akin to the rule of *Mapp* v. *Ohio* than to the *Gideon* rule. The Mapp rule prohibits the introduction of evidence seized in violation of the Fourth Amendment. Most authorities recognize that the purpose of the *Mapp* rule is the deterrence of illegal police conduct. See, *e.g.*, Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 *Duke L. J.* 319 (1962); Bender, *supra*, 110 *U.Pa.L.Rev.* at 660. We, like the courts in most jurisdictions, have held that *Mapp* does not apply retroactively in a collateral attack upon a prior judgment no longer subject to direct appeal. See *State* v. *(Edgar) Smith*, *supra*, and the cases cited therein at 78-79. The rationale of these decisions, which is supported by the commentators, is that the purpose of the *Mapp* rule is deterrence, and it is impossible to deter past conduct. See, *e.g.*, *United States ex rel. Angelet* v. *Fay*, 333 *F.2d* 12, 19 (2*dCir.*1964). See also Traynor, *supra*, 1962 *Duke L. J.* 319.[11]

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[11] Justice Traynor's remarks concerning the retroactive application of the Mapp rule are also appropriate in relation to the retroactive application of *Escobedo*:

> "The most telling reason for collateral attack on judgments of conviction is that it operates to eliminate the risk of convicting the innocent. Such a risk attends any conviction ensuing from the witting use of perjured testimony, the suppression of evidence, an involuntary confession, the denial of an opportunity to present a defense, and the denial of the right to counsel. A comparable risk arises upon a failure to provide an indigent defendant with a trial transcript necessary to perfect his appeal.
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> "The most telling distinction of a defendant convicted on evidence resulting from an unreasonable search or seizure is that he is clearly guilty. It is not the purpose of the exclusionary rule to protect the guilty. Its purpose of deterring lawless law enforcement will be

[fol. 359] We note that certiorari has been granted in *United States ex rel. Angelet* v. *Fay, supra* (*U.S.* , 13 *L.Ed.2d* 28 (1964)) and *United States ex rel. Linkletter* v. *Walker*, 323 *F.2d* 11 (*5th Cir.* 1963) (337 *U.S.* 930, 12 *L.Ed.2d* 295 (1964)). Both these cases refused to hold *Mapp* retroactive on collateral attack. Despite the similarities noted above between *Mapp* and *Escobedo*, there is a significant difference between the cases, which leads us to believe that if *Mapp* should be held retroactive, it does not follow that *Escobedo* should. *Weeks* v. *United States*, 232 *U.S.* 383, 58 *L.Ed.* 652 (1914), held that the Fourth Amendment prevented the admission in federal courts of all evidence obtained by an unreasonable search and seizure. Later, *Wolf* v. *Colorado*, 338 *U.S.* 25, 93 *L.Ed.2d* 1782 (1949) held that although the state obtained its evidence unconstitutionally, the evidence was nevertheless admissible in a state trial. It is clear, therefore, that it has always been unconstitutional [fol. 360] to conduct an unreasonable search and seizure. *Mapp* merely provided an exclusionary remedy for the violation of a pre-existing constitutional right. Therefore, it could be argued that reliance of the police on *Wolfe* was not in good faith, because they were on notice that their

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amply served in any state from now on by affording defendants an orderly procedure for challenging the admissibility of the evidence at or before trial and on appeal.

"Deterrence would be served but little more and at exorbitant cost by affording the weapon of collateral attack to those defendants who were convicted before the adoption of any exclusionary rule and hence had no way of challenging the admissibility of the evidence. To begin with, their cases are history, and they should not now be given the power to rewrite it. To place at the disposition of the guilty an extraordinary remedy designed to insure the protection of the innocent would be to invite needless disruption in the administration of justice. There is a world of difference between a timely objection to evidence on the basis of the exclusionary rule and uprooting of final judgments." 1962 *Duke L. J.* at 340-41.

conduct in obtaining the evidence was unconstitutional.[12] On the other hand, prior to *Escobeda*, it had generally been assumed that the police could lawfully detain and question a suspect, in the absence of his counsel, for a reasonable period of time. Since the police were not on notice that their conduct was unconstitutional, their reliance on the existing status of the law was justified.

III

The defendants next contend that under *Malloy* v. *Hogan*, *U.S.* , 12 *L.Ed.* 2*d* 653 (1964), decided by the United States Supreme Court on June 15, 1964, it was constitutionally impermissible in the present case for the prosecutor and the trial court to tell the jury that they may infer from the defendants' failure to testify that the defendants could not truthfully deny the inculpatory facts produced against them. The defendants argue that the rule of *State* v. *Corby*, 28 *N.J.* 106 (1958), which permits such comments, has been declared unconstitutional by *Malloy*. *Malloy* held that the Fifth Amendment's privilege against self-incrimination is applicable to the states through the Due Process Clause of the Fourteenth Amendment, and expressly overruled *Twining* v. *New Jersey*, 211 *U.S.* 78, 53 *L.Ed.* 97 (1908) [fol. 361] and *Adamson* v. *California*, 332 *U.S.* 46, 91 *L.Ed.* 1903 (1947) on this point. *Twining* and *Adamson* assumed but did not decide that "comment" was forbidden by the Fifth Amendment. Since 1873 a federal statute (18 U.S.C.A. §3481) has prohibited comment in federal courts, therefore the constitutional issue of the permissibility of comment has never been decided by the United States Supreme Court. See *Wilson* v. *United States*, 149 *U.S.* 60, 58 *L.Ed.* 650 (1893); *Bruno* v. *United States*, 308 *U.S.* 287, 84 *L.Ed.* 257 (1939). The holding in *Malloy* was that a witness's right in a state proceeding to refuse to answer questions on the ground that his answers would tend to incriminate him was to be determined by federal standards. *Malloy* did not involve the issue of "comment." However, the court's opinion contains the following dictum:

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[12] See the dissenting opinion of Judge Marshall in *United States ex rel. Angelet* v. *Fay*, *supra*, 333 F.2d at 25.

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence." 12 *L.Ed. 2d* at 659.

See also *State* v. *Murphy*, 85 *N.J. Super.* 391 (*App.Div.* 1964).

Assuming *arguendo* that *Malloy* forbids comment by the prosecutor and the court on defendant's failure to testify, the question is whether that ruling should be applied here. When the defendents were tried, they made no issue of their guilt. Indeed, their attorneys told the jury that the defendants were guilty of the crime with which they were charged. The sole thrust of the defense offered was to persuade the jury to recommend life imprisonment and thus spare defendants' lives. Under these circumstances the comment [fol. 362] of the prosecutor and the trial court could not have influenced the jury in its determination of the defendants' guilt.

The defendants further contend that the prosecutor's comment about the failure of the defendants to take the stand, suggested to the jury that they should consider that failure on the issue of punishment. We considered the prosecutor's remarks in *State* v. *Johnson*, *supra*, 31 *N.J.* at 512 and held that:

> "[I]n view of the trial court's clear instruction that the defendants' failure to testify should not be considered by the jury in their determination whether to recommend life imprisonment—the only real issue before the jury—we are satisfied that the remark did not prejudice the substantial rights of the defendants."

Therefore, we conclude that the comment of the prosecutor and the trial court could not have adversely affected defendants' rights to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment. In so holding, we express no opinion as to whether *Malloy* forbids adverse comment by the prosecutor or the court on defendants' failure to testify. Nor do we express an opinion

whether, if *Malloy* does forbid such comment, that rule should be applied retroactively in a collateral proceeding under circumstances other than those in this case.

IV

The defendant Cassidy next contends, for the first time, that his confession that he had a gun in his possession at the time of the holdup, and the introduction of the gun into evidence at the trial were the products of fraudulent state-
[fol. 363] ments made by the police.[12] Further, in the affidavit he alleges that the police promised to save him from the electric chair if he confessed. Each of these allegations goes to the issue of voluntariness and could have been raised

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[12] Cassidy attempted to obtain relief on the basis of this allegation for the first time on his appeal to the Third Circuit. That court made no determination of the point because it had not been raised in the District Court. It noted, however:

> "If the Prosecutor did give the prisoner this assurance, it is arguable that the rules of evidence should exclude an admission thus obtained in exchange for a promise of favorable treatment. See *Shotwell Mfg. Co.* v. *United States*, 1963, 371 *U.S.* 341, 348, 83 *S.Ct.* 448, 9 *L.Ed.* 2d 357 (dictum) (federal prosecution): *Crawford* v. *United States*, 5*th Cir.* 1955, 219 *F.* 2*d* 207 (semble) (federal prosecution). See generally *Bram* v. *United States*, 1897, 168 *U.S.* 532, 18 *S.Ct.* 183, 42 *L.Ed.* 568 (federal prosecution); Maguire, *Evidence of Guilt*, 1959, *p.* 139. But such a bargain is an improper means of persuasion rather than a device of compulsion. It may produce a statement that is untrustworthy because a suspect may be induced to incriminate himself falsely when he is led to believe that all things considered, he will gain thereby. But bargaining for a confession is not shocking and outrageous in the way that third degree methods are. Probably for this reason, courts have not heretofore made the rule which excludes testimony induced by promise of favor a constitutional mandate." *United States ex rel. Johnson* v. *Yeager*, 327 *F.2d* 311, 317 (1964).

on the direct appeal or on his first application for post-conviction relief, when the issue of voluntariness was considered. See *State v. Johnson, supra*, 34 *N.J.* at 223. This issue, having been previously determined, is foreclosed from our present consideration. *State v. (Edgar) Smith, supra; R.R.* 3:10A-5.

V

Defendants next contend that their confessions, even if voluntary, should have been excluded from evidence because they were obtained while the defendants were illegally de-
[fol. 364] tained in that they had been arrested but had not been taken without unnecessary delay before a magistrate as as directed by R.R. 3:2-3(a). This issue was decided in our recent dcision in *State* v. *Jackson*, 43 *N.J.* 148 (1964), which noted that the federal exclusionary rule of *McNabb-Mallory (Mallory* v. *United States*, 354 *U.S.* 449, 1 *L.Ed.* 2*d* 1479 (1957): *McNabb* v. *United States*, 318 *U.S.* 332, 87 *L.Ed.* 819 (1943)), is not of constitutional dimension. There being no definitive United States Supreme Court holding to the contrary since our decision in that case, we will not depart from *Jackson*. Moreover, even if the Supreme Court should declare the *McNabb-Mallory* rule applicable to the states, since that rule is not predicated upon the issue of the unreliability of the evidence obtained during illegal detention, the rule should not be applied to the trial of this case which occurred in January 1959. See our discussion above considering the similar application of *Escobedo*.

Cassidy further contends that he was illegally arrested. If true, this factor would be pertinent to the issue of the illegality of his detention. As we have discussed immediately above, the *McNabb-Mallory* rule which excludes in federal prosecutions confessions obtained during illegal detention is not a rule of constitutional dimension and thus not applicable to our courts.

VI

As mentioned above, the Third Circuit has held that the confession of Godfrey was involuntary and therefore inadmissible. But the confessions of the defendants Johnson
[fol. 365] and Cassidy were found to be voluntary. *United States ex rel. Johnson* v. *Yeager, supra*, 316, 319. The

defendants now argue that since Godfrey's confession has been held to have been involuntary and therefore inadmissible, the introduction of his confession, which implicated them, at the joint trial of Godfrey, Johnson and Cassidy, denied Johnson and Cassidy a fair trial. The Third Circuit considered this point. It held that the admission of Godfrey's involuntary confession did not prejudice the rights of Johnson and Cassidy:

> "Finding only Godfrey's confession to have been involuntary on the record before us, we have considered whether the admission of that confession itself affected the constitutional rights of Cassidy and Johnson. The introduction of a coerced confession in evidence against one defendant is not in itself the imposition of constitutional wrong upon his co-defendant. *Stein* v. *New York, supra,* 346 *U.S.* at 194-196, 73 *S.Ct.* at 1097-1098; *Malinski* v. *New York, supra,* 324 *U.S.* at 410-412, 65 *S.Ct.* at 786. The jury was instructed to consider each confession as evidence against its maker only. And here we have the additional consideration that substantially the same information was placed before the jury in the confessions of Cassidy and Johnson as in the confession of Godfrey. In these circumstances, we think it is not reasonable to believe that the jury would or, indeed, had any occasion to go beyond Cassidy's and Johnson's own confessions and use similar statements in Godfrey's confession against them." *Id.* 318-19.

We are entirely in accord with the above views as to Johnson and Cassidy. Furthermore, while the conclusion of the Third Circuit that Godfrey's confession was involuntary alters the status of his confession as to him—it is no longer admissible on the state of the evidence before that court—the status of his confession as to Johnson and Cassidy remains unaltered since Godfrey's confession was never admissible against them.

On their direct appeal from their convictions the defendants contended that they were deprived of a fair trial by the denial of their motions for separate trials. They [fol. 366] argued that their respective confessions inculpated the others, and the jury could not be expected to limit the

effect of the statements to the declarant. We noted that the confessions of all three defendants were in substantial agreement, that none placed the onus of the crime on the others, and that the trial judge repeatedly cautioned the jury on the limited effect to be given each confession. We held that, under those circumstances, a severance was unnecessary. 31 *N.J.* at 505-506. In so holding we necessarily concluded that the admission of each defendant's confession did not prejudice the others in the jury's finding of guilt. The defendants, in essence, make the same argument now that was made on their direct appeal, *i.e.*, that the admission of Godfrey's confession prejudiced them. As above mentioned, we have already decided this issue on defendants' direct appeal. An issue, even of constitutional dimensions, once decided, may not be relitigated. See *State* v. (*Edgar*) *Smith, supra*, at 74; *R.R.* 3:10A-5.

Defendants further contend that their confessions were a product of Godfrey's confession, which the Third Circuit has held to be involuntary. They argue that their confessions should have been inadmissible as the "evil fruits" of the coercion of Godfrey. In their affidavits they allege that before they confessed, the police told them that Godfrey had made a statement implicating them.

Of course, whether Godfrey's statements were voluntary or involuntary does not affect the previous findings of this court and the federal courts on the voluntariness of Johnson's and Cassidy's confession. Assuming the truth of the defendant's affidavits and assuming further that Godfrey's statements as used by the police were a factor in causing [fol. 367] Johnson and Cassidy to confess, we conclude that the constitutional rights of Johnson and Cassidy were not violated. This is not a case where a defendant's involuntary statement has led to other evidence which is introduced at trial against *him*. See, *e.g.*, *Wong Sun* v. *United States*, 371 *U.S.* 471, 487-88, *L.Ed.2d* 441, 455 (1963). *Cf. Trilling* v. *United States*, 260 *F.2d* 677, 694 (*D.C. Cir.* 1958); *Jackson* v. *United States*, 273 *F.2d* 521 (*D.C. Cir.* 1959). Here, the alleged coercion of Godfrey's confession was in violation of his constitutional rights and would preclude its introduction in evidence against *him*. Analogous cases dealing with the introduction of illegally seized evidence against one who was not the victim of the seizure, have consistently held that

that person cannot assert the denial of another's rights. See *Wong Sun* v. *United States, supra,* at 492, 9 *L.Ed.* 2*d* at 458; *State* v. *Nobles,* 79 *N.J. Super,* 442 (*App. Div.* 1963). *Cf. Goldstein* v. *United States,* 316 *U.S.* 114, 86 *L.Ed.* 1312 (1942). Voluntariness remains the test in this situation. *State* v. *Wade,* 40 *N.J.* 27, 35 (1963).

VII

The defendants finally contend that the prosecutor's summation to the jury was so inflammatory that it deprived them of due process of law. The character of the prosecutor's remarks was fully considered by this court on the defendants' direct appeal and we were completely satisfied that the defendants' right to a full and fair trial was not denied. *State* v. *Johnson, supra,* 31 *N.J.* at 513. Defendants are precluded from again raising this issue. R.R.3:10A-5. Nevertheless, the defendants contend that the court should reconsider because the Third Circuit (327 *F.2d* 311) has now held Godfrey's confession to have been involuntary and [fol. 368] therefore inadmissible. However, they offer no explanation of how this factor now makes the prosecutor's remarks so prejudicial to them as to be a denial of due process. We can see no new prejudice to the defendants from the Third Circuit's finding that Godfrey's confession was inadmissible, since the inadmissibility of Godfrey's confession does not, of course, undermine the propriety of Godfrey's being a co-defendant.[14]

The judgment of the Law Division is affirmed.

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[14] Godfrey's confession was not the only evidence the State produced against him. For example, Godfrey told a friend that he had been in the holdup, but had not done the shooting. See *State* v. *Johnson, supra,* 31 *N.J.* at 501.

[fol. 369] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF STANLEY CASSIDY

STATE OF NEW JERSEY,
County of Camden, ss:

Stanley Cassidy of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am one of the petitioners in this matter and I am presently in the New Jersey State Prison, Trenton, New Jersey.

2. I have read the affidavit of my mother, Mildred Cassidy, and the facts contained in paragraphs 2 through 13 of my mother's affidavit are the same as my recollection of the events and are incorporated herein as if recited at length.

3. About 5:00 A. M., Wednesday, January 29, 1958, the detectives took me to City Hall in Camden, New Jersey. I was first taken to a room by one of the detectives, whom I believe was Detective Philipp Large. Wayne Godfrey was in this room with another detective and told Detective Large to get me out of there.

4. I was then taken to the 6th floor of the City Hall in Camden and questioned by about 7 detectives. The detectives whose names I know and who were there are as follows: Detectives, Nate Jones, Golden Sunkett, Philipp Large, Barney Tracy and detective Large's brother. These detectives kept asking me questions as to where I had been and what I knew about the murder of Mr. Davis. One detective, then another would ask me questions. I told them I did not want to say anything before I talked with my mother about getting me a lawyer. I was told that my re-
[fol. 370] quest would be taken care of later, and I was told "but first give a statement".

5. These detectives questioned me continuously for about 3 hours. I was told I was going to the electric chair unless I told them everything.

6. I had never been arrested and interrogated by the police before. I was confused, nervous and upset, not only by this time, the method and manner of my arrest, but by

the large group of detectives and their actions, manner and method of questioning me.

7. In response to the detectives questioning me, I denied everything. In spite of my denials they kept on questioning me. No one at any time, prior to my arraignment, advised me of my right to remain silent, to contact my family, or to see a lawyer. The detectives told me I had to give a statement.

8. The detectives did many things to make me confess. The detectives, at one time, put some chairs together to show me what the electric chair looked like. They told me to sit in the chair with my arms on the arm rests and my legs and back firmly against the chair. I was told to sit up straight. Over my arms and legs were shackles like the electric chair. In back of my head they put a telephone book. I was told to imagine over my head a mask, then they said: "The switch is about to be thrown" and then [fol. 371] said: "It was thrown" and at that time one of them hit the book in the back of my head. I was frightened crazy.

9. I was tired and had had no sleep the previous night.

10. At that time Nate Jones read to me quotations from some written statements. Tey told me that Wayne Godfrey had said I was involved. They said they knew everything and that I might as well tell them the truth. Then they brought in Wayne Godfrey who identified me without speaking to me. Again, I asked to contact my parents and talk to my family. I asked for a lawyer. When I asked for my parents this time, Detective Large threw a telephone book at me. During this period, Detective Sunkett put a book behind my head and slapped the book with either his hand, his fist, or his gun. I am not sure which it was. Before I gave my first statement, Detective Sunkett repeatedly said throughout the questioning: "You are a wise guy, you know all the answers" and he cursed me and cursed me. They told me if I asked for my mother or father again that they would: "Lock them up too."

11. The detectives told me if I didn't give them a statement I would go to the electric chair. It was about 29 hours since I had last slept, finally, I told them I would give them a statement. After I gave the statement I again asked to

speak with my parents and was told that I could only see them after I completed all the questioning.

[fol. 372] 12. After I gave the statement to Detective Tracy, Chief Dube came in and I asked him if I could talk to my parents so that I could get a lawyer. Chief Dube said I would have to wait until the statement and questioning was finished.

13. About an hour or so after I gave my statement, I was taken to a room where Wayne Godfrey was. Wayne Godfrey told me he had confessed.

14. I was taken to another room and questioned more about the gun. I was taken to Prosecutor Cohen's Office and they took a second statement from me. Prosecutor Cohen asked me if I had a gun. I told him I had been holding a gun for a friend. The Prosecutor said he only wanted to check the gun to see if it had been fired, and if not, I would be cleared of murder. I gave them the statement because of the promise from Mr. Cohen that afterwards I could contact my mother and father. However, even after the statement, I was not allowed to contact my parents. Mr. Cohen said he would get in touch with my parents, which he did not do. Detective Sunkett said he would go to my mother's house and tell her what was happening. This, he did not do.

15. About midnight they said they had more questions and took a third statement from me. I asked Chief Dube if I could telephone my mother. He said I could if I completed the statement. After the statement the detective told me that I could see my family when I went before the Judge. I asked about making a telephone call but I was [fol. 373] told I was not allowed to. During the times that they questioned me, they told me about Wayne Godfrey's confession.

16. I believe I saw Noah Hamilton's typewritten statement but I do not believe I saw Godfrey's in typewritten form. However, prior to my second and third statements they allowed me to talk to Godfrey and he said that I might as well confess because he had.

17. I was arraigned on Friday, January 31, 1958, and the Judge asked me why I had no lawyer. I told him that the police had not allowed me to contact my folks so that I could

get one. The Judge told the Prosecutor to let us speak to our families so that they could get us lawyers.

18. I spoke to my Aunt Blanche Hurdle, my mother, my father, and my Aunt Bertha, in a room for about 10 minutes. I begged them to get me a lawyer because now the police were telling me I was going to go to the electric chair.

/s/ Stanley Cassidy.

Sworn and Subscribed to, before me, this 22 day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey, My Commission Expires Oct. 26, 1966.

[fol. 374] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF MILDRED CASSIDY

STATE OF NEW JERSEY,
County of Camden, ss:

Mildred Cassidy of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am the mother of Stanley Cassidy, and I am 52 years of age, and I reside at 507 Chestnut Street, Camden, New Jersey.

2. About 4:00 A.M. on Wednesday, January 29, 1958, I was awakened by shouts and noises and by the sounds of someone up the stairs of our home. The sound of the first person running was followed by the sound of a number of other persons racing up the stairs. There was a great deal of noise and commotion. I heard pictures being knocked down from the wall alongside of the stairway and voices shouting. I was startled and frightened.

3. I got out of my bed, left my bedroom and went into the hall and called for my son, Stanley. Then, I heard the door slam. A white detective was standing at the top of our second floor stairway with a drawn gun in his hand. Stanley's bedroom door was ajar and I saw him lying on the bed with his feet and arms extended in the air while another detective, either Camden Detective Nate Jones or Camden Detective Golden Sunkett was bending over and searching him.

4. Other detectives were rummaging through Stanley's clothes, his closet, his bureau, and I saw other detectives breaking open cigarettes and smelling them. After a while they pushed Stanley out of the room and shoved him into the hallway. The detectives put a bedspread on the floor in Stanley's room and they threw all of his personal effects, clothing, even his dirty clothes into the bedspread and wrapped it up and took it with them.

[fol. 375] 5. When I first came out of my bedroom, I asked the detectives what was wrong, what was happening, but no one would answer. When I saw what they were doing to Stanley in his room and in searching our home, I continued to ask what was wrong and what they were doing. One

told me "not to worry". Another one said: "Stanley knows."

6. I was very frightened and I began to cry. Stanley told me "don't cry mother". Detective Golden Sunkett shouted at Stanley "You have a helluva lot of nerve telling your mother not to cry. If a son of mine did something like you did, I would chop his head off." I asked Detective Sunkett, whom I have known for many years, if he could tell me what it was about and he said: "No, Mildred, my hands are tied."

7. About this time I called my brother, Charles Gaines to help me. My brother looked frightened and upset. My brother, Charles, was told by Detective Nate Jones "Don't worry and go back to bed." I heard my brother ask Detective Hones "What's wrong?" Detective Jones using my brother's nickname said: "Birdie, don't worry, go back to sleep. Stanley knows why we are here."

8. A number of the detectives shoved Stanley in front of them and took him downstairs to the first floor.

9. Stanley had a coat on the chair in the front living room and as he put it on something rattled. Camden Detective Phillip Large put his hand into Stanley's coat pocket and took out a Milk of Magnesia can. Detective Phillip Large opened the can and in it were some white pills. He broke one open, smelled it, and offered it to Detective Sunkett to also smell it. They seemed to look at each other [fol. 376] knowingly, shrug, and then Detective Large put the can into his pocket.

10. Stanley said he had a terrible headache. Detective Phillip Large turned to him and said: "Brother, if you've got a headache now, just wait, your troubles are just beginning:"

11. When I was downstairs I noticed a number of detectives coming from the alley of the rear of the house, and even though it was winter time and cold, the front door was open and all the lights in the house were on. There seemed to be police and detectives all around the house and in the rooms of our house.

12. I kept asking the detectives what was wrong and where they were taking Stanley. They never told me anything concerning the reason for Stanley's arrest.

13. No one showed me a search warrant, nor a warrant for Stanley's arrest, nor did anyone give a reason for enter-

ing our home. The detectives and the police were in our home about one hour and left around 5:00 A.M.

14. My brother, Charles, and I were nervous and upset and frightened. We went to the home of my sister, Mrs. Nettie Jones, 620 Spruce Street, Camden, N. J. We stayed there until about 5:00 P.M. listening to the radio and trying to decide what to do.

15. We did not know what to do. We did not know how to act. We did not know what was wrong.

16. In my presence, my sister, Mrs. Nettie Jones, called the Camden Detective Bureau at least three times prior to 5:00 P.M., but each time she received no information concerning her request about my son, Stanley.

[fol. 377] 17. About 5:00 P.M. we decided we would go in person to the Camden Detective Bureau. Accompanied with my husband, Adrian Cassidy, my sister, Mrs. Nettie Jones, and my brother, Charles Gaines, we drove in a car to the Camden Detective Bureau.

18. My sister, and my husband, Adrian, accompanied me inside to the Detective Bureau, while my brother, Charles, waited outside since he was driving the car. I talked to a white detective who was in plain clothes and whose name I do not know. I asked this detective if I could see my son, Stanley Cassidy. The detective said: "You cannot see him, and I cannot give you any information." I asked him if I could speak to Detective Golden Sunkett, one of the officers who had come to my home, and I was told that Detective Sunkett was not there but had gone home to eat.

19. We left the Camden Detective Bureau and went to the home of Detective Nate Jones in Camden. Detective Jones was also one of the arresting officers. I asked his wife if he was at home and she told me that he had gone to Newark, New Jersey, on business. Mrs. Jones said that she could tell me "nothing". Mrs. Jones advised me to go to the Camden Detective Bureau for additional information. We left the home of Detective Jones and went to the home of Detective Golden Sunkett. Detective Golden Sunkett was not at home but his wife told me after repeated requests on my part that "Stanley is involved in a murder case" and she thought Stanley "was in very deep". Mrs. Jones and I broke down and cried. We left the home of Detective Sun-

kett and returned to the home of my sister, Mrs. Nettie Jones. About 11:00 P.M. that night I went to bed, still being unable to talk with my son, Stanley.

[fol. 378] 20. Despite my efforts and the efforts of my family, I never saw, nor heard from my son, Stanley, from the time of his arrest until his arraignment on Friday, January 31, 1958.

21. At the arraignment, the Judge asked my husband and I if we were Stanley's parents and what we were going to do for a lawyer. I told the Judge "I would do the best I could but we have no money. The prosecutor said that Stanley wanted to speak to his parents.

22. We went to a room near the court room and spoke with Stanley. Stanley said: "Please, please, mother get me a lawyer. After they took my statements they told me I am going to the electric chair."

23. In the hallway, outside of the Municipal Court where the arraignment was, someone pointed to a man and said he was a good lawyer. We retained this man as Stanley's attorney. His name is Louis N. Caggiano, Esq.

/s/ Mildred Cassidy.

Sworn and Subscribed to, before me this 11th day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey, My Commission Expires Oct. 26, 1966.

[fol. 379] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF CHARLES S. GAINES

State of New Jersey,
County of Camden, ss:

Charles S. Gaines of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the maternal uncle of Stanley Cassidy and presently 39 years of age and I reside at 301 Pine Street, Camden, New Jersey.

2. I have been employed for some time and I am presently employed by the Budd Company, Philadelphia, Pa.

3. About 3:30 or 4:00 A.M. on Wednesday, January 29, 1958, I was asleep in bed on the third floor of my sister, Mrs. Mildred Cassidy's home.

4. Stanley and I were having a conversation when suddenly the doorbell began to ring repeatedly.

5. Stanley went down to answer the door and then I heard a great deal of commotion; people running up the stairs, pictures falling off the walls, and the shouting of voices.

6. I heard Stanley yell: "No, no, don't." At this time I saw the glare of flashlights or search lights from the window of my bedroom. I heard the sound of many footsteps coming up the stairs. I got out of bed and went down to the second floor. I looked in Stanley's room and say that a detective had Stanley by the ankles shaking him up and down on the bed.

7. I believe there were at least three other detectives rummaging and searching through Stanley's room and his personal effects and clothing.

8. I repeatedly and continuously asked the detectives what [fol. 380] was wrong and what was happening, but they did not answer. Finally, detective Nate Jones, with whom I was acquainted, told me: "Don't worry Birdie, go back to bed." Detective Jones said: "We got what we wanted."

9. I was so shocked and upset by the confusion and commotion, my heart was pounding and pounding, that I meekly obeyed and returned to my room on the third floor. I remained there for a brief period of time until my sister,

Mildred Cassidy, called to me and said to the effect that they were going to take Stanley out of the house.

10. I then came back down stairs. As I came upon the scene, I heard Stanley ask his mother not to cry. A detective, I am not sure which one, then said something to the effect that Stanley had really done something serious.

11. The detectives then shoved Stanley before them into the stairwell and took him down to the first floor. The detectives also took all of Stanley's personal effects wrapped in a sheet or pillow case.

12. When they got to the first floor livingroom, a detective, whom I believe was detective Phillip Large, picked up a coat which was Stanley's. Detective Large took a container from the pocket, opened it and took out some pills or capsules. Detective Large broke one open, smelled it, and offered it to Detective Sunkett, whom I believe also smelled it. The detectives looked at each other and Detective Large put the container with pills in his pocket. Stanley said something about having a headache and Detective Large said something to this effect "That's nothing to what you will have."

[fol. 381] 13. There were many detectives and police around the house, in the rooms of the house, and coming from the rear through an alley and in front of the house. Stanley was taken to a waiting automobile and driven away. Although I asked and although I heard my sister ask, we were never informed why Stanley was arrested, nor allowed to talk to him about his arrest.

14. It was now about 5:00 A.M. Wednesday, January 29, 1958. My sister, Mildred Cassiday and I, went to another sister's home, Mrs. Nettie Jones at 620 Spruce Street, Camden, New Jersey.

15. I went to work that morning but I was so upset and disturbed I could not work and returned to my sister, Nettie Jones' house. We were uncertain as to what we should do. I heard my sister, Nettie, several times call the Camden Detective Bureau to try to get information about Stanley. The Detective Bureau would tell her nothing. We had no idea why Stanley was being detained.

16. Finally, about 5:00 P.M. my sister, Mrs. Mildred Cassidy and my sister, Mrs. Nettie Jones, and Stanley's father, Adrian, and I, went to the Camden Detective Bureau.

17. I waited outside in the car when we got to the City since I was the driver. After a short time they came out of Camden City Hall and told me that a detective had said they could neither speak to nor see Stanley.

18. We drove to the home of Detective Nate Jones, but he was not at home.

19. I then drove the group to the home of Camden Detective Golden Sunkett. I did not wait in the car this time but accompanied the group. We were told by Detective [fol. 382] Sunkett's wife, Mamie, that Detective Sunkett was not at home. In answer to our many questions, Mrs. Sunkett finally stated that Stanley was being held for being involved in a murder. The women cried.

20. I drove them to the home of my sister, Nettie. We didn't know what to do; we didn't know how to see Stanley. I believe it was the next morning that I heard over the radio that Stanley Cassidy had confessed to participating in a murder.

/s/ Charles Gaines.

Sworn and Subscribed to, before me this 11th day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey, My Commission Expires Oct. 26, 1966.

[fol. 383] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF BLANCHE HURDLE

STATE OF NEW JERSEY,
County of Camden, ss:

Blanche Hurdle of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am 41 years of age and I presently reside at 410 N. Salford Street, Philadelphia, Pa.

2. I am employed at the Philadelphia Naval Depot at Philadelphia, Pa.

3. On Thursday, January 30, 1958, I read in the newspaper that my nephew, Stanley Cassidy, had been arrested and connected with a murder. I contacted my sister, Mrs. Mildred Cassidy by telephone. I then went to the home of another sister, Mrs. Nettie Jones, 620 Spruce Street, Camden, N. J., where the family gathered. I was informed that Stanley was being held at the Camden City Hall and that all of the efforts to see Stanley or to speak to him had been unsuccessful. I told my family that nevertheless I would try to see Stanley.

4. Early in the morning of the next day, Friday, January 31, 1958, I went to the office of the Camden County Prosecutor and spoke to Mr. Mitchell Cohen, the Camden County Prosecutor. I told him that I would like to speak to my nephew, Stanley Cassidy. Prosecutor Cohen said: "Hell, no: You cannot see him and no one else can see him." I told Mr. Cohen that he did not have to curse me because I understood plain English and that a plain "no" was sufficient.

5. I left the Prosecutor's office and saw detectives Sunkett and Jones, in the hallway. Detective Sunkett asked me if I was trying to see Stanley. I told him "I was". Detective Sunkett told me that "no one can see him until after the hearing". Detective Sunkett said the hearing [fol. 384] was going to come on shortly and that if I waited I could probably see Stanley but most likely I would not be allowed to talk to him. I went into the court room and waited.

6. Stanley and the two others involved were brought into the court room and after awhile the Prosecutor asked Stanley if he had a lawyer. Stanley replied in effect that he did not have a lawyer. The Prosecutor asked Stanley why he had no lawyer. Stanley replied: "I have not been allowed to call my family nor a lawyer." The Prosecutor then asked Stanley if any of his family was in the court room. Stanley replied that his aunt, Blanche, was present, meaning me.

7. Meanwhile my sister, Mildred, had left the court room because she had become so upset and crying. The Prosecutor then asked if Stanley's aunt was present. I was so dumbfounded that I did not answer at first. The Prosecutor again asked Stanley if his aunt was present. Stanley again said that "my aunt is here". The Prosecutor again called for me and this time I answered and went forward to where they were all standing. The Prosecutor asked me if I was getting counsel for Stanley. I replied that "We haven't even had a chance to speak to Stanley, we don't know what to do." The Prosecutor then told me that I could speak with Stanley in a room around the court. I went back to this room and spoke to Stanley. Meanwhile, my sister and I believe Stanley's father, Adrian, now deceased, entered the room. Stanley begged my sister, Mildred, to get him a lawyer because he said, "now, they tell me I am going to go to the electric chair". After about 5 to 10 minutes at the most, the police [fol. 385] told us Stanley had to go back to his cell.

/s/ Blanche Hurdle.

Sworn and Subscribed to, before me this 11th day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey, My Commission Expires Oct. 26, 1966.

[fol. 386] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF NETTIE JONES

STATE OF NEW JERSEY,
County of Camden, ss:

Nettie Jones of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am the maternal aunt of Stanley Cassidy, and I am 45 years of age, and at the present time I reside at 620 Spruce Street, Camden, N. J.

2. I am self-employed as a beautician in Camden, New Jersey.

3. About 5:15 A.M. on Wednesday, January 29, 1958, my sister, Mrs. Mildred Cassidy and my brother, Charles Gaines, came to my home and told me that my nephew, Stanley Cassidy had just been picked up and taken away by the police. Neither my sister, Mildred, nor my brother, Charles, could give me any idea why Stanley had been arrested. We didn't know what to do, we didn't know what was wrong, we did not know who to ask.

4. I called the Camden Detective Bureau about three or four times during that day and I was told that there could be no information given on Stanley Cassidy. We waited in my house until about 5:00 P.M. and when Stanley did not appear we decided to visit the Camden Detective Bureau.

5. My sister, Mildred Cassidy, my brother, Charles Gaines, and my brother-in-law, Adrian Cassidy and I went to the Camden Detective Bureau. My brother, Charles, was the driver and stayed in the car. We went in to the City Hall and we spoke to a white detective who told us that Stanley could not be seen. One of us asked where Detective Gonden Sunkett was and the detective answered that he was at home eating supper.

[fol. 387] 6. We left the Detective Bureau and went to the home of Detective Nate Jones. He was not at home and his wife told us she knew nothing. She told us to go to the Detective Bureau for information.

7. We then went to the home of Detective Golden Sunkett. He was not at home and we spoke with his wife, Mamie

Sunkett. She told us that Stanley was "deeply involved in a murder" but she could not give us any details. My sister, Mildred, became very upset and was crying. We went back to my house and waited there until 11:00 P.M. but we still heard nothing from Stanley.

8. The next day I learned that Stanley had confessed to participating in a murder.

/s/ Nettie Jones.

Sworn and subscribed to before me this 11th day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey. My Commission Expires Oct. 26, 1966.

[fol. 388] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF SYLVESTER JOHNSON

STATE OF NEW JERSEY,
County of Camden, ss:

Sylvester Johnson of full age being duly sworn according to law, upon his oath deposes and says:

1. I am one of the petitioners in this matter and presently confined in the New Jersey State Prison.

2. I was arrested in Newark, New Jersey, at about 5:00 P.M., Wednesday, January 29, 1958, at the home of my uncle, Joseph Evans.

3. Wayne Godfrey had personally brought the police to where I was staying in Newark, New Jersey. The arresting officers accompanying Wayne Godfrey included Newark and Camden Police. The Newark detective in charge, I believe, was named Clayton B. Norris. I believe the Detective, Vincent Conley, was in charge of the Camden Police, and among the Camden Police officers was Detective Nate Jones.

4. Following my arrest, I was taken to a Newark Police Station.

5. Neither at the time of my arrest, nor subsequently was I advised by anyone that I had the right to obtain counsel, that I either had the right or could talk to an attorney, or my family. No one had advised me that I could remain silent.

6. At the Newark Police Station there were at least 5 or [fol. 389] 6 police officers including Detective Vincent Conley interrogating me. This interrogation continued intermittently for 4 or 5 hours. About 5 hours after I was arrested I was taken to a court in the same building.

7. At the time I was taken to a court in Newark for my arraignment I asked to see an attorney and to be able to contact my family; my requests were ignored. Detectives, Conley and Norris, told me I could see an attorney and talk to my family after "you give us a confession". It was about 10:00 o'clock at night when I was in the court room in Newark, New Jersey, on January 29, 1958 for my arraignment. I was frightened and confused but I believe

that Detective Vincent Conley signed some papers and that the Judge asked the officers some questions. I was not advised of my right to see counsel, nor of my right to see my family, nor of my right to remain silent. I was in the court room for 10 minutes or less and then was taken out. I was not asked anything by the court or by anyone.

8. After the court appearance I was taken back to the interrogation room and fingerprinted. I was questioned intermittently until about 1:00 or 1:30 A.M., Thursday, January 30, 1958.

9. During this interrogation I again asked Detective Vincent Conley if I could get in touch with my uncle, Joseph Evans, in Newark, so that he could arrange to get me a lawyer. Detective, Vincent Conley, told me in effect [fol. 390] that I could neither see nor speak to anyone until after I had given a confession.

10. About 1:30 A.M., Thursday, January 30, 1958, I was returned to my cell and about 2:00 A.M. I was taken out of the cell for the trip back to Camden, New Jersey.

11. Three detectives accompanied me on my trip to Camden, New Jersey, one of whom was Detective Vincent Conley, and the other two I do not know their names. During the ride to Camden, New Jersey, I was questioned persistently and constantly. I answered that I had no knowledge of any murder or holdup. I asked these detectives many times if I could speak to my family so as to get a lawyer when we arrived in Camden. Detective Conley answered to the effect that I could not and would not be allowed to see anyone until after I told them what they wanted to know and Detective Vincent Conley, got mad at my request and my refusal "to cooperate" and he punched me in the mouth. Detective Vincent Conley's punch cut my lip and thereafter it began to swell.

12. We arrived in Camden City Hall Police Station about 4:00 A.M., January 30, 1958. My interrogation was continued by Detectives Vincent Conley and Philip Large, and other detectives, whose names are unknown to me.

13. About 4:45 A.M. I was taken to Chief Dube's Office where I was told that Wayne Godfrey had confessed and [fol. 391] that Stanley Cassidy had confessed, and that both Stanley Cassidy and Wayne Godfrey were brought in separately and identified me as the person who had

actually done the shooting. Again, I asked if I could contact my mother to get a lawyer and again I was told I could see no one until I gave a statement.

14. I had only a half hour's sleep in the prior 48 hours. Finally, I felt that I wasn't going to be able to talk to my family nor to an attorney until I did what the police wanted. I gave the statement they wanted and again I asked to contact my mother but I was told by Chief Dube that I would only get a chance to see a lawyer and my family when I went to Police Court.

15. I was taken to the arraignment on Friday morning, January 31, 1958. My mother was in the audience and came forward to where I was standing before the Judge. The Judge asked me if I had a lawyer. My mother answered that she had retained Elmer Bertman, Esq., and that Mr. Bertman could not be there at that time but would get in touch with me later in the afternoon of that day.

/s/ Sylvester Johnson.

Sworn and subscribed to before me, this 22 day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey. My Commission Expires Oct. 26, 1966.

[fol. 392] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF ALLIAN JOHNSON

STATE OF NEW JERSEY,
County of Camden, ss:

Allian Johnson of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am the mother of Sylvester Johnson, and I am 50 years of age, and I reside at 752 Division Street, Camden, New Jersey.

2. I am employed at the Campbell Soup Company, Camden, New Jersey, and have been so employed for 19 years.

3. On either Monday, January 27, 1958, or Tuesday, January 28, 1958, at about 7:00 P.M. someone knocked at the door of my residence which was then 693 Everett Street, Camden, New Jersey. I opened the door and a group of men burst in, stating that they were looking for my son, Sylvester. They later identified themselves verbally as Camden Detectives.

4. One of the detectives raced through the house, opened the rear door, and let in a group of other detectives and, I believe, uniformed policemen. I was shocked and frightened and continually asked why they were looking for my son. I was only told that I would find out later. They searched the entire house for about one-half of an hour. They never showed me a search warrant nor informed me as to why they had searched my home. There were at least seven or eight police officers present. I remember that search lights were set up in front of the house.

[fol. 393] 5. After the police left I called the Camden Detective Bureau and asked what they were searching for. The man answering the phone told me he had no information to give me.

6. The next day I again called the Camden Detective Bureau. Again, I identified myself as Sylvester's mother but was told by an unidentified man that he could give me no information as to whether Sylvester was arrested.

7. On Wednesday, about 7:00 P.M., January 29, 1958, I heard on the radio that Sylvester had been apprehended

at Newark, New Jersey. I immediately contacted Attorney Elmer Bertman, at his home.

8. Mr. Bertman told me to come to his home which I did. After explaining the circumstances as I had heard them from the radio, Mr. Bertman agreed to represent Sylvester. He stated that his fee would be $1,500.00 and that I would have to give him $500.00 the next morning. I asked Mr. Bertman to be at the Camden City Hall when they brought Sylvester in from Newark.

9. Mr. Bertman told me it was impossible to know or to find out when Sylvester would be brought in. Also he stated that when he did arrive that Sylvester could be held incommunicado for 24 hours. He promised to see Sylvester early the next morning after I paid the $500.00.

10. On Thursday morning, January 30, 1958, I paid Mr. Bertman the $500.00. On Friday, January 31st, I saw my [fol. 394] son at the arraignment at the Camden City Hall. It seemed that his mouth was swollen as if he had been hit. However, for some unknown reason I did not mention it nor did he. I told him that I had retained a lawyer for him.

/s/ Allian Johnson.

Sworn and subscribed to before me, this 19 day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey. My Commission Expires Oct. 26, 1966.

[fol. 395] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF VERNIE JONES

STATE OF NEW JERSEY,
County of Camden, ss:

Vernie Jones of full age, being duly sworn according to law, upon her oath deposes and says:

1. I was the girl friend of Sylvester Johnson at the time of his arrest during January, 1958.

2. I am 25 years of age and I reside at 425 Henry Street, Camden, New Jersey.

3. I am presently employed as a Sales Clerk at Nichols Discount Center, Maple Shade, New Jersey.

4. On January 29, 1958 at about 8:00 P.M. I heard on the radio that Sylvester Johnson had been apprehended in Newark, New Jersey, in connection with a murder. I immediately attempted to contact his mother, Mrs. Allian Johnson, at her home but was unsuccessful.

5. About 10:00 P.M. I telephoned the Camden Detective Bureau, and stated that I was Sylvester's sister, and asked if I could see or speak with him. An unidentified man told me that Sylvester had not been brought in yet.

6. About 8:00 A.M. on Thursday, January 30, 1958, I again called the Camden Detective Bureau. Again I pretended to be his sister and inquired as to whether I could see him. I was told that I could not see him yet.

7. About 10:00 A.M. on Thursday, January 30, 1958, I [fol. 396] went to the Camden County Jail, posing as his sister, and was told by a guard that Sylvester could not have any visitors.

/s/ Vernie Jones.

Sworn and subscribed to before me, this 21 day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey. My Commission Expires Oct. 26, 1966.

[fol. 397] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 398] IN THE SUPREME COURT OF NEW JERSEY

Appeal Docket No. 3278

Criminal Action On Appeal

STATE OF NEW JERSEY, Plaintiff-Respondent,

vs.

SYLVESTER JOHNSON AND STANLEY CASSIDY,

Defendants-Appellants.

MANDATE ON AFFIRMANCE—January 19, 1965

This cause having been duly argued before this Court by Mr. M. Gene Haeberle, counsel for the appellant, and Mr. Norman Heine, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Camden County Court is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Camden County Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the 19th day of January, 1965.

[File endorsement omitted.]

[fol. 399] PETITION FOR REHEARING AND SUPPLEMENTAL PETITION FOR REHEARING COVERING 16 PAGES OMITTED FROM THIS PRINT. IT WAS DENIED, AND NOTHING MORE BY ORDER —February 23, 1965.

[fol. 400] IN THE SUPREME COURT OF NEW JERSEY

No. M-158 September Term 1964

No. 3278

STATE OF NEW JERSEY, Plaintiff-Respondent,

vs.

SYLVESTER JOHNSON, ET AL., Defendant-Appellant.

ORDER DENYING PETITION FOR REHEARING—February 23, 1965

No justice who voted with the majority having moved a reconsideration, the petition for rehearing is denied.

Witness the Honorable Joseph Weintraub, Chief Justice, at Trenton this twenty-third day of February 1965.

John H. Gilder, Clerk.

[File endorsement omitted.]

[fol. 401] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1965

No. 205 Misc.

SYLVESTER JOHNSON AND STANLEY CASSIDY, Petitioners,

v.

NEW JERSEY

On petition for writ of Certiorari to the Supreme Court of the State of New Jersey.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —November 22, 1965

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 762 and placed on the summary calendar and set for oral argument immediately following No. 80, Misc.

And it is further ordered that duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 796221

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JOHN F. DAVIS, CLE

TITION NOT PRINTED

IN THE

Supreme Court of the United States

October Term, 1965.

No. ~~[illegible] Misc.~~ 762 76

SYLVESTER JOHNSON and STANLEY CASSIDY,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

BRIEF IN PARTIAL OPPOSITION TO WRIT OF CERTIORARI.

NORMAN HEINE,
Camden County Prosecutor,
Court House,
Camden, New Jersey.

Huntzinger Printing Corp., *Appellate Printers,* Camden, N. J.

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STATEMENT OF POINTS INVOLVED.

I. The prosecutor's summation and the charge of the trial court were not violative of defendants' constitutional rights. (Points 1 and 2 of Petition.)

A. The defendants having conceded their guilt of first-degree murder, comment by the trial court and prosecutor on defendants' failure to testify did not influence the jury in the determination of defendants' guilt.

B. Assuming the applicability of *Griffin v. California*, this decision should not apply retroactively.

II. The summation of the prosecutor was proper. (Points 3 and 4 of Petition.)

III. The case, *sub judice*, is inapposite to *Escobedo v. Illinois*, nevertheless, the State urges the granting of petitioners' writ of certiorari as to this issue. (Point 5 of Petition.)

A. The holding of *Escobedo* should not be extended to apply to those cases where the defendant failed to ask for counsel.

B. Even if the holding in *Escobedo* should be extended it should not be applied retroactively.

IV. The alleged delay in arraignment does not invalidate the confessions. (Point 6 of Petition.)

V. Petitioner, Cassidy, was not deceived and induced to turn over a gun to the authorities as the result of allegedly false statements to the prosecutor. (Point 7 of Petition.)

VI. The mere fact that Wayne Godfrey's confession was found to be involuntary by the Circuit Court of Appeals does not require a reversal of petitioners' case. (Points 8 and 9 of Petition.)

ARGUMENT.

I.

THE PROSECUTOR'S SUMMATION AND THE CHARGE OF THE TRIAL COURT WERE NOT VIOLATIVE OF DEFENDANTS' CONSTITUTIONAL RIGHTS.

A.

The defendants having conceded their guilt of first-degree murder, comment by the Trial Court and prosecutor on defendants' failure to testify did not influence the jury in the determination of defendants' guilt.

The defendants chose not to take the stand in their own behalf and their reasons for not doing so were made abundantly clear by their counsels' opening and closing statements.

Cassidy's lawyer, in his opening to the jury, stated:

> "I have made up my mind to one thing, I am not going to try to fool you, members of the jury, I am not going to put forth any sham defense. Because if I do, I feel I am going to harm my client. Because I feel that you members of the jury would be able to see through it at once. I intend to listen to these facts as presented by the State as to how this alleged crime took place. At the close of the State's case it is my intention to present the defense to this case as I would, naturally, in any other case, but certainly in a case which is a capital case, with the truth, and I feel confident that, members of the jury, when you have heard

all the evidence in this case, whatever your verdict may be, that the verdict that you give will be given after you consider all the facts and after you consider all the mitigating and extenuating circumstances, and I feel certain that that verdict will be given without any partiality or bias.

"That is what I ask of you members of the jury, to give a true and honest verdict in accordance with the facts of this case" (JA234a).

In his summation he stated:

"Great mention was made, and undoubtedly will be further made, by the prosecutor, to the fact that the defendant failed to take the stand, and because he did not take the stand, we may all assume that he did not (1752) do so because he could not deny that which is charged. That is an honest statement. The action of the defendant was an honest act. He has not taken the stand to conjure up stories and lies. The facts are as they are presented" (JA270a).

Johnson's lawyer, in his opening, stated:

"As carefully as you listen, that is how carefully I shall listen. For, I, too, am concerned with the facts and with the truth, as you are. You too will listen to all the facts and will consider and determine that they all be true. If something is not true, we do not want it. If something is not factual, we do not want it, whether it be for the good of the defendants, whether it be bad for the defendants, in favor or against the State. All we do want are the truthful facts, that which happened. For then, in that manner, we can determine how to close our case to you and you in turn deliberate and determine a fair verdict" (JA235a).

In his summation, he stated:

"I also think that I can anticipate that the Prosecutor will have much to say to you in regard to the fact that the defendant did not take the stand. And I believe that the Prosecutor will charge you—rather, have the court charge you, that the failure of the defendant to take the stand from that fact, that you may infer or believe that the defendant could not successfully answer the evidence or charges against him.

"Now, members of the jury, I think the Prosecutor will dwell upon that, I believe he has already earlier this afternoon.

"I told you members of the jury at the beginning of this case that I had made up my mind that we were not going to present any trick defense, that we were not going to try to fool you, and that we were going to ask the State to prove their case according to law, and I think that we have done that.

"I have told you that the defendants were entitled to have the charges against them proven against them according to law.

"And, members of the jury, the reason that Sylvester Johnson did not take the stand was because I don't believe and I know that he could not successfully deny these particular charges against him. His confession certainly implicates himself.

"Members of the jury, this case was lost a year ago by the defense. This case was lost when a citizen had the alertness of mind to take down a license number and reported it to the police. This case was lost from that day on. There is no contest here as to who wins or loses the case. No matter what happens, the State wins this case. The evidence as you have heard it shows, and that you can draw from that naturally, that

a robbery was attempted and that during the course of that robbery a killing took place.

"But, members of the jury, you are not compelled by law because you find that a robbery took place or attempted to take place, and that there was a killing in the course of that robbery, to bring in the death penalty. It is not mandatory. And I think that you know that from the questions that we asked you during the time that we questioned you as prospective jurors" (JA281a-JA283a).

The Court in its charge stated:

"None of the defendants took the stand to deny their participation in the crime. Under our law, a defendant cannot be compelled to testify, but he is competent to testify, and he has a right to testify, and his failure to be a witness in his own behalf is no presumption of guilt and does not erase the presumption of innocence. The failure of the defendants to take the witness stand should not be considered as prejudicial in respect to your determination as to whether or not you should attach to your verdict the recommendation of life imprisonment, in case you, the jury, should find any of the defendants guilty of murder in the first degree. If any inculpatory or incriminating facts are testified to which concern the acts of that particular defendant which he could by his oath deny, his failure to testify in his own behalf raises an inference that he could not truthfully deny those inculpatory or incriminating facts."

It is impossible to conceive of injury to defendants by the prosecutor's or court's comment in view of counsel's position that defendants were, admittedly, guilty of first-degree

murder. The defense conceded defendants' guilt and were devoted exclusively to an attempt to save defendants from the death penalty. Under these circumstances, the comment of the prosecutor and the trial court could not have influenced the jury in the determination of defendants' guilt. *State v. Johnson,* 43 N. J. 527, 591, 206 A. 2d 737, 747 (1965).

The case, *sub judice,* is distinguishable from *Griffin v. California,* in that, in *Griffin* the defendant contested his guilt. Here guilt is admitted and the only question the defendants submitted to the jury was the extent of punishment.

B.

Assuming the applicability of Griffin v. California, this decision should not apply retroactively.

A reversal of these convictions bottomed on *Griffin v. California,* 380 U. S. 609 (1965), would require retroactive application of a factually distinguishable precedent.

We note that this court has recently granted certiorari on the issue of retroactive application of *Griffin* in an Ohio habeas corpus proceeding. *U. S. ex rel. Shott v. Tehan,* 339 F. 2d 990 (6th Cir.), cert. granted May 24, 1965, 33 L. W. 3376. In that case, as well as in *Griffin,* the defendant contested the issue of his guilt and offered no explanation for his failure to testify. But, in the case *sub judice,* the guilt of defendants was *not* in issue. See counsels' statements, supra.

The State concedes that *Griffin v. California,* supra, prohibits comment where a defendant stands to be injured by virtue of his exercise of a constitutional right (not to testify). However, as the New Jersey Supreme Court found

below, the comment by the prosecutor could *not* have adversely affected defendants' constitutional rights to a fair trial. *State v. Johnson,* supra. The New Jersey Supreme Court made specific reference to its earlier holding that the prosecutor's remarks did not prejudice the substantial rights of the defendants in view of the trial court's clear instruction to the jury that the failure to testify should not be considered in the determination of whether or not to recommend life imprisonment. *State v. Johnson,* 31 N. J. 489, 512, 158 A. 2d 11, 24 (1960), as cited at 43 N. J. 572, 591, 206 A. 2d 737, 747 (1965). (See trial court's charge, supra.)

The circumstances of this case do not appeal to our "deepest sentiment of justice", and, hence, do not warrant a retroactive application of *Griffin's* interpretation of the *Malloy* rule (*Malloy v. Hogan,* 378 U. S. 1). *State v. Johnson,* 43 N. J. at 583.

In *Linkletter v. Walker,* 381 U. S. 618 (1965), the most recent pronouncement of the Supreme Court upon the retrospective application of constitutional judicial decision, held the rule of *Mapp v. Ohio,* 376 U. S. 643 (1961), not retrospective in application. *Mapp,* as does the present case, are concerned with the application of a rule of evidence. Here, as in *Linkletter,* to apply the rule retrospectively would serve as a foundation for upsetting convictions in a large number of cases decided long ago wherein the accused failed to testify and the court and prosecuting attorney commented on such facts in accordance with procedures authorized by New Jersey by statute. Release, again, as in *Linkletter,* would not be based on the innocence of the accused, but on a newly declared ruling first announced long after the time of conviction. Such retrospective application of that newly declared ruling would not benefit the honest citizen but would serve only to create a new method whereby convicted felons could avoid their con-

viction. See *Pinch v. Maxwell*, 34 L. W. 2190 (Ohio Sup. Ct., September 29, 1965); *In Re Gaines*, 34 L. W. 2114 (Calif. Sup. Ct., August 20, 1965).

II.

THE SUMMATION OF THE PROSECUTOR WAS PROPER.

The allegations of the impropriety of the prosecutor's summation has heretofore been decided in the Supreme Court of New Jersey. *State v. Johnson*, 31 N. J. 489, 509, 513, 159 A. 2d 11 (1960). At that time the court determined that the graphic summation of the prosecutor was justified by the evidence. This matter was again considered by the New Jersey Supreme Court which again declared it was completely satisfied that defendant's rights to a full and fair trial were not denied by the prosecutor's summation.

> "The defendants finally contend that the prosecutor's summation to the jury was so inflammatory that it deprived them of due process of law. The character of the prosecutor's remarks were fully considered by this court on the defendants' direct appeal and we were completely satisfied that the defendants' right to a full and fair trial was not denied." *State v. Johnson*, 43 N. J. 572, 596, 206 A. 2d 737, 750 (1965).

The defendants further contend that the prosecutor's comment about the failure of the defendants to take the stand suggested to the jury that they should consider that failure on the issue of punishment. The prosecutor's remarks were considered by the New Jersey court, *State v. Johnson*, supra, 31 N. J. at 512, which declared:

> "In view of the trial court's clear instructions that the defendants' failure to testify should not be considered by the jury in their determination whether to recommend life imprisonment—the only real issue before the jury—we are satisfied that the remark did not prejudice the substantial rights of the defendants."

The New Jersey Supreme Court, in re-examining this issue on defendants' petition for post-conviction relief, stated that:

> "Therefore, we conclude that the comment of the prosecutor and the trial court could not have adversely affected defendants' rights to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." *State v. Johnson*, 43 N. J. 591, 206 A. 2d 737 (1965).

III.

THE CASE, SUB JUDICE, IS INAPPOSITE TO ESCOBEDO v. ILLINOIS, NEVERTHELESS, THE STATE URGES THE GRANTING OF PETITIONERS' WRIT OF CERTIORARI AS TO THIS ISSUE.

A.

The holding of Escobedo should not be extended to apply to those cases where the defendant failed to ask for counsel.

Defendants allege the denial of an opportunity to consult with counsel and a failure of the police to advise them of their rights to remain silent prior to their confessions. These allegations were made, for the first time, in their

affidavits submitted to the New Jersey Supreme Court over six years after their original trial. Relying upon *Escobedo v. Illinois*, 378 U. S. 478 (1964), they conclude that their constitutional rights have been so violated as to require a reversal of their convictions.

There is hardly an issue of criminal constitutional law which has divided the courts more than the issue of whether the holding of *Escobedo* should be extended to apply to those cases where the defendants did not request the assistance of counsel. New Jersey has answered this question in the negative.[1] Other jurisdictions hold similarly.[2]

---

[1] **State v. Ordog**, 45 N. J. 347 (1965); **State v. Lanzo**, 44 N. J. 560 (1965); **State v. Bindhammer**, 44 N. J. 372 (1965); **State v. Hodgson**, 44 N. J. 151, 162-163 (1965); **State v. Vigliano**, 43 N. J. 44 (1964); **State v. Smith**, 43 N. J. 67 (1964), cert. den. 379 U. S. 1005 (1965); **State v. Scanlon**, 84 N. J. Super. 427 (App. Div. 1964).

[2] **People v. Hartgraves**, 202 N. E. 2d 33 (Ill. 1964), cert. den.; **People v. Lewis**, 207 N. E. 2d 65, 66 (Ill. 1965); **People v. Golson**, 207 N. E. 2d 782 (Pa. 1964); **Comm. v. Coyle**, 203 A. 2d 782 (Pa. 1964); **Comm. v. Patrick**, 206 A. 2d 295, 299 (Pa. 1965); **Browne v. State**, 131 N. W. 2d 169 (Wis. 1964); **State v. Upchurch**, 141 S. E. 2d 528, 531 (No. Car. 1965); **State v. Elam**, 263 N. C. 273, 139 S. E. 2d 601, 607 (No. Car. 1965); **State v. McLeod**, 203 N. E. 2d 349 (Ohio 1964); **Cowans v. State**, 209 A. 2d 552 (Md. 1965); **Anderson v. State**, 205 A. 2d 281 (Md. 1964); **State v. Hall**, 397 P. 2d 261, 264-265 (Idaho 1964); **State v. Worley**, 132 N. W. 2d 764 (Neb. 1965); **Morford v. State**, 395 P. 2d 861 (Nev. 1964); **Bean v. State**, 398 P. 2d 251, 253-255 (Nev. 1965); **State v. Fox**, 131 N. W. 2d 684 (Iowa 1964); **People v. Gunner**, 15 N. Y. 2d 226, 205 N. E. 2d 852 (N. Y. 1965); **Comm. v. Roy**, 207 N. E. 2d 284, 288 (Mass. 1965).

Intermediate appellate courts further support our position: **People v. Agar**, 253 N. Y. S. 2d 761 (1964); **Davis v. State**, 388 S. W. 2d 940, 941 (C. C. A. Tex. 1965); **People v. Scanlon**, 84 N. J. S. Ct. 427, 202 A. 2d 448 (1964); Cf. **State v. Neely**, 398 P. 2d 482 (Ore. 1965); **State v. Dufour**, 206 A. 2d 82 (R. I. 1965); **State v. Mendes**, 210 A. 2d 50, 52-54 (R. I. 1965); **Galarza Cruz v. Delgado**, 233 F. Supp. 944, 948 (D. Puerto Rico 1964).

See too, **State v. Winsett**, 205 A. 2d 510, 525 (Del. Super. Ct. 1964); **Ward v. Comm.**, 205 Va. 564, 138 S. E. 2d 293 (Va. 1964); **Biddle v. Comm.**, 141 S. E. 2d 710, 713; **State v. Longmore**, 134 N. W. 2d 66 (Neb. 1965); **United States v. Ogilvie**, 334 F. 2d 837, 843 (7th Cir. 1964); **Long v. United States**, 338 F. 2d 549, 550 (D. C. Cir. 1964); **Jackson v. United States**, 337 F. 2d 136 (D. C. Cir. 1964); **United States v. Childress**, 347 F. 2d 448, 450 (7th Cir. 1965).

The more recent decisions cry out for elucidation by this court so as to put the question to rest.

In *Commonwealth v. Negri*, 34 L. W. 2186-2187 (Pa. S. Ct., September 28, 1965), the court, in commenting on *Russo v. New Jersey*, 33 L. W. 2621 (3d Cir., 1965),[3] declared:

> "The clear indication to this court is to accept and follow the decision of the Third Circuit on this matter until some further word is spoken by the Supreme Court of the United States."

This question has reached such critical proportions that the New Jersey Supreme Court has issued its advisory directive suggesting to the trial courts and prosecutors not to follow the holding in *Russo* until this court decides further in this matter.

Of crucial importance to law enforcement officials is the resolution by this Court of the following questions:

1. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a State criminal trial by reason of the Constitution of the United States solely because the investigating officers *did not advise him* of his right to consult with counsel and his right to remain silent?

2. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a State criminal trial by reason of the Constitution of the United States because the prosecution did not establish that the defendant at the time of the questioning made a *knowing and intelligent*

---

[3] **Russo v. New Jersey** held that a request for counsel by defendant is not a significant factor in determining if counsel should be provided and that counsel must be provided, assuming there has not been an intelligent waiver of this right, regardless of whether a defendant requests counsel. This decision has, **sub silentio**, applied its holding retroactively.

waiver of both (a) his right to consult with counsel, and (b) his right to remain silent?

3. If so, is such a free and voluntary confession inadmissible where the record does not affirmatively establish that the defendant was not advised of his rights and did not waive them?

B.

Even if the holding in Escobedo should be extended it should not be applied retroactively.

The New Jersey Supreme Court, in the case *sub judice*, assumed for the sake of decision, that the allegations contained in defendants' affidavits were within the principle announced by *Escobedo* (an assumption which it considered unsound), *State v. Johnson*, 43 N. J. 572, 206 A. 2d 737 (1965), but, nevertheless, refused to apply *Escobedo* retroactively. The court analogized *Escobedo* with the holding in *Mapp v. Ohio*, 367 U. S. 643, 81 Sup. Ct. 1684, 6 L. Ed. 2d 1081 (1961), and stated:

> "Where the reliability of the guilt-determining process is seriously impugned there is good reason for applying the new rule to a case already decided. It would offend our sense of justice to continue to incarcerate a convicted man where subsequent consideration cast grave doubts upon the reliability of the determination of his guilt. But where the conviction was obtained as a result of a procedure not considered fundamentally unfair at that time, and subsequent judicial decisions cast no substantial doubts upon the reliability of the determination already made, no compelling reason exists for disturbing a decision no longer subject to direct appeal."

This Court, in *Linkletter v. Walker*, 381 U. S. 618, 14 L. Ed. 2d 601, 85 Sup. Ct. (1965), refused to apply *Mapp* retroactively and declared:

> "Once the premise is accepted that we are neither required to, nor prohibited from applying a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

In *Commonwealth v. Negri*, 34 L. W. 2186-2187 (Pa. S. Ct., September 29, 1965), it was declared the rule of *Escobedo* is not available to a Pennsylvania prisoner whose conviction became final before *Escobedo* was decided. The court declared:

> "The fact that the accused may not have known that he had a right to remain silent or that he had a right to the assistance of counsel does not in any way negate the fact that the statement was made voluntarily or that the probability of truthfulness is very high. And, while the Fifth Amendment right is against compulsory self-incrimination, we do not think that an accused's ignorance rises to such compulsion.
>
> "We do not think that the purpose of Escobedo was to ferret out unreliable or coerced confessions, any more than the purpose of Mapp was to deny admissibility to irrelevant or unprobative physical evidence. The identical purpose of each was to provide adequate assurance of police adherence to the constitutional principles inherent in due process, by denying fruit to the poisoned seed. See Commonwealth ex rel. Wilson v. Rundle, 412 Pa. 109, 194 A. 2d 143 (1963)."

If we agree that *Escobedo* more nearly resembles *Mapp* than *Gideon*, then we must conclude that *Escobedo* should not be applied retroactively, since this court refused to so apply *Mapp* in the *Linkletter* decision.

This question is equally vexing to the courts and clarification by this Court would be of prime importance.

IV.

THE ALLEGED DELAY IN ARRAIGNMENT DOES NOT INVALIDATE THE CONFESSIONS.

The fact that the defendant is over-detained before arraignment in a state proceeding does not invalidate the confession obtained in the interim. While it is the rule in federal prosecution that confessions obtained in these circumstances must be suppressed, *Mallory v. United States*, 354 U. S. 449 (1957); *McNabb v. United States*, 318 U. S. 332 (1943), this exclusionary rule is a function of the supervisory power of the federal courts over federal prosecution and does not rise to the dignity of a constitutional prohibition. *Colombe v. Connecticut*, 367 U. S. 568 (1961); *Stroble v. California*, 343 U. S. 181, 197 (1952); *Gallegos v. Nebraska*, 342 U. S. 55 (1951). No reason is advanced to warrant a change of this court's position. New Jersey has not altered its position. *State v. Ordog*, supra.

V.

PETITIONER, CASSIDY, WAS NOT DECEIVED AND INDUCED TO TURN OVER A GUN TO THE AUTHORITIES AS THE RESULT OF ALLEGEDLY FALSE STATEMENTS TO THE PROSECUTOR.

The Third Circuit Court of Appeals touched on this point and made the following observation:

> "The only evidence of any improper conduct during this two-hour interval appears in Cassidy's testimony at the hearing on motion for a new trial, where he testified as follows:
>
> 'I remember when I made my first confession, I told Chief Dube that I didn't have the gun and the prosecutor came and got me and asked me did I have a gun at home at all. I said no at first, because the gun did not belong to me. He said, "Well, look, if you have a gun at home, all we want to do is to check it, (to) see if it has been fired." He said, "We won't use this as evidence against you if it hasn't been fired."'
>
> "If the prosecutor did give the prisoner this assurance, it is arguable that the rules of evidence should exclude an admission thus obtained in exchange for a promise of favorable treatment. See Shotwell Mfg. Co. v. U. S., 371 U. S. 341, 348 (1963) (dictum) (federal prosecution); Crawford v. U. S., 5th Cir. 1955, 219 F. 2d 207 (semble) (federal prosecution). See generally *Bram v. U. S.*, 168 U. S. 532 (1897) (federal prosecution); Maguire, Evidence of Guilt (1959), p. 139. But such a bargain is an improper means of persuasion rather than a device of compulsion. It may produce a

statement that is untrustworthy because a suspect may be induced to incriminate himself falsely when he is led to believe that, all things considered, he will gain thereby. But bargaining for a confession is not shocking and outrageous in the way that third degree methods are. Probably for this reason, courts have not heretofore made the rule which excludes testimony induced by promise of favor a constitutional mandate.

"Cassidy did not assign as a basis for his motion for a new trial or as a ground for federal habeas corpus that his admission concerning his gun had been induced by a promise not to use this evidence against him. Thus, no ruling in this regard is presented for appellate review. In thus disposing of the matter, we do not hold or imply that a finding of such inducement would entitle the prisoner to relief on constitutional grounds." 327 F. 2d 311, 317 (1964).

There is nothing in the Circuit Court's opinion which suggests that this question is of sufficient importance to even warrant this Court's consideration. This is beside the point that, since it was not raised properly below, either at the State level or at the Federal District Court level, it is not a proper subject for review.

VI.

THE MERE FACT THAT WAYNE GODFREY'S CONFESSION WAS FOUND TO BE INVOLUNTARY BY THE CIRCUIT COURT OF APPEALS DOES NOT REQUIRE A REVERSAL OF PETITIONERS' CASE.

This point was considered and disposed of adversely to these petitioners by the same court that voided the Godfrey confession, when it stated:

"Finding only Godfrey's confession to have been involuntary on the record before us, we have considered whether the admission of that confession itself affected the constitutional rights of Cassidy and Johnson. The introduction of a coerced confession in evidence against one defendant is not in itself the imposition of constitutional wrong upon his co-defendant. Stein v. New York, supra, 346 U. S. (156) at 194-196, 73 S. Ct. (1077) at 1097-1098 (97 L. Ed. 1522); Malinski v. New York, supra, 324 U. S. (401) at 410-412, 65 S. Ct. (781) at 786 (89 L. Ed. 1029). The jury was instructed to consider each confession as evidence against its maker only. And here we have the additional consideration that substantially the same information was placed before the jury in the confessions of Cassidy and Johnson as in the confession of Godfrey. In these circumstances, we think it is not reasonable to believe that the jury would or, indeed, had any occasion to go beyond Cassidy's and Johnson's own confessions and use similar statements in Godfrey's confession against them." Id., at pp. 318-319.

The New Jersey Supreme Court found itself in accord. *State v. Johnson*, 43 N. J. 594, 206 A. 2d 737, 748-749 (1965).

Petitioners still rely on *Ashcraft v. Tennessee*, 322 U. S. 143 (1944), as requiring reversal of their convictions. *Ashcraft v. Tennessee*, supra, is clearly inapposite. In *Ashcraft*, this Court remanded and reversed the conviction of defendant Ware, who did not confess, because co-defendant Ashcraft's confession, introduced at their joint trial, was found to be involuntary. The Court noted:

"Ware's conviction was sustained by the Tennessee Supreme Court on the assumption that Ashcraft's confession was properly admitted and his conviction valid. Whether it would have been sustained had the court

reached the conclusion we have reached as to Ashcraft, we cannot know.

"Doubt as to what the State court would have done under the changed circumstances brought about by our reversal of its decision as to Ashcraft is emphasized by the position of the State's representatives in this court."

In the case *sub judice*, neither the trial court nor the New Jersey Supreme Court based its finding of voluntariness of petitioners' confessions on the assumption that co-defendant Wayne Godfrey's confession was valid. Both petitioners independently made voluntary confessions acknowledging their participation in the crime.

In *Malinski v. New York*, 324 U. S. 401 (1945), the Court, in a similar case, stated:

> "The furtherest we have gone in a comparable case from a State Court is to vacate the judgment against the co-defendant who did not confess and remand the case to the State Court for further consideration. Thus, in Ashcraft v. Tennessee . . ., we followed that procedure at the suggestion of the Attorney General of the State, where the judgment against the co-defendant who did not confess was sustained by the State Court on the assumption that the confession which we held to be coerced was properly admitted and that the conviction of the defendant who did confess was valid."

CONCLUSION.

For the reasons hereinabove stated, the Petition for Writ of Certiorari should be granted as to Points I and III, but denied as to all other points.

NORMAN HEINE,
Camden County Prosecutor.

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JOHN F. DAVIS, C

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 762

SYLVESTER JOHNSON, and STANLEY CASSIDY,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR PETITIONERS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 762

SYLVESTER JOHNSON, and STANLEY CASSIDY,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR PETITIONERS

Opinions Below

The New Jersey trial court opinion [T.R. 78-82][1] and judgment [T.R. 16-17] are not reported. The Opinion of the Supreme Court of New Jersey [T.R. 345-364] is reported at 43 N.J. 572, 206 A.2d 737.

The long history of this case is detailed in the Petition for Post-Conviction Relief and specific reference is made to all other reported opinions. [T.R. 6-9]

[1] Citations to the portions of the joint appendix supplied to this Court and printed in the Transcript of Record will be prefixed "T.R."

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on January 19, 1965, and a timely petition for rehearing denied February 23, 1965. [T.R. 386-387] The Petition for Writ of Certiorari was filed on May 21, 1965, and was granted on November 22, 1965. [T.R. 388] The jurisdiction of this Court rests on 28 U.S.C. § 1257 (3).

Questions Presented

1. In light of the circumstances of petitioners' interrogation by the police, were their incriminating statements constitutionally inadmissible as evidence against them under the principles of *Escobedo* v. *Illinois*?

2. Where the prosecutor has commented and the trial court has charged the jury on the failure of the defendants to testify, have the petitioners been deprived of their constitutional rights against self-incrimination, such that their convictions should be reversed even though they were tried prior to *Malloy* v. *Hogan* and *Griffin* v. *California*, and even though the only contested issue was the choice between imposition of sentence or the death penalty?

3. Where the confession of one defendant, later held to have been obtained in violation of the constitutional rights of that defendant, led to the confessions of both petitioners, is the admission of their confessions an unconstitutional deprivation of their rights?

4. Where motions for severance are denied, and three defendants are tried jointly, and the confessions of each,

expressly implicating the others, are admitted into evidence over objection, and where two of the confessions given by one of the defendants are held to be coerced, does justice require that the other defendants be granted a new trial free from the prejudicial effect of the coerced confessions?

5. Where the prosecutor's inflammatory summation grievously misstated and distorted the facts, were defendants so seriously prejudiced that they were deprived of the fair trial guaranteed by due process of law?

6. Where the prosecutor, acting to induce the jury to sentence petitioners to death, argued extensively that petitioners should be executed in order to deter others from engaging in crime, an unfounded theory not based on evidence, were petitioners deprived of their lives without due process of law?

7. Where statements have been elicited from a suspect in a state criminal proceeding during a substantial period of unconstitutional police detention, such that the statements are the product of the unlawful detention, does their introduction at a later trial of that suspect deprive him of his constitutional rights?

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

The New Jersey statutory provisions and rules involved provide:

> "If an accused in a criminal action does not testify after direct evidence is received of facts which tend to prove some element of the crime and which facts, if untrue, he could disprove by his own testimony, counsel and the judge may comment on his failure to testify, and the trier of fact may draw an inference that accused cannot truthfully deny those facts." *New Jersey Statute 2A:84A-17, Rule 23 (4).*

> "Proceedings before a magistrate: (a) Appearance: An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereon. A preliminary hearing before the magistrate shall be held forthwith." *New Jersey Revised Rules, 3:2-3(a).*

STATEMENT OF THE CASE

The Homicide

Two of three Negro defendants, convicted of murder in the first degree, presently awaiting execution, are seeking reversal of the refusal of the New Jersey courts to grant post-conviction relief.

On the evening of January 24, 1958, Edward Davis, the operator of a toy store in Camden, New Jersey, was shot and killed. As a result of information obtained from witnesses who had noticed a car leaving the scene, Wayne Godfrey was arrested in Camden on Tuesday, January 28, 1958 at approximately 1:00 P.M. At approximately 4:00 A.M. the following morning, Petitioner Stanley Cassidy was arrested at his home at 312 Pine Street, Camden, New Jersey. At 5:00 P.M. that evening, Wednesday, January 29, 1958 Petitioner Sylvester Johnson was arrested in Newark, New Jersey.

During the two days following their arrests, after continuous interrogations, each of the three defendants gave statements implicating themselves and each other in the shooting. In their statements, Petitioners admitted perpetrating the killing during the course of an armed robbery. However, in the post-trial proceedings, Petitioners, although admitting their participation in the shooting, denied that it was in the course of a robbery but claimed that they were trying to collect a debt owed by the storekeeper to Johnson. They gave a total of six formal statements, all of which were used against them at their joint trial.

Legal Proceedings

All three defendants were indicted for murder and their motions for severance refused. Their joint jury trial lasted from January 12, 1959 to January 24, 1959.

During the trial, before these implicating statements were introduced into evidence, the trial court held an *in camera* hearing to determine whether the statements were voluntary. At this hearing the police officers who made the arrests and elicited the statements, along with the stenographer who transcribed them, testified. [T.R. 85-206] Their testimony was addressed solely to the circumstances immediately surrounding the recording of the statements in the office of Chief of County Detectives Wilfred Dube. There was no testimony elicited from them concerning the events between the respective arrests and the obtaining of the formal statements, nor any testimony concerning the mental and intellectual equipment or social background of the defendants. The defendants themselves did not testify and offered no evidence concerning the taking of the statements. The trial court concluded that the statements were obtained voluntarily. They were thereafter offered to the jury without any further evidence by prosecution or defense on the question of their voluntariness or truthfulness, although the use of the statements was objected to by defendants, and there were objections to specific portions as incriminating to the other defendants but not made in the presence of the defendants, which objections were denied. In its charge to

the jury, the trial court did not instruct the jury of any need to pass upon the voluntariness of the statements. [T.R. 322-336] None of the defendants took the stand at this trial, and no evidence was offered on their behalf. All three defendants were found guilty of murder in the first degree without any recommendation of leniency, and all three were sentenced to death.

Their convictions were appealed to the Supreme Court of New Jersey. On that appeal, an issue was raised as to the validity of the trial court's procedure in determining voluntariness of the statements; however, no objection was raised nor evidence offered that the statements were untrue or involuntary. The appeal also questioned the trial court's failure to sever. The convictions were affirmed. 31 N.J. 489, 158 A.2d 11 (1960).

The issue of coercion was raised for the first time in a motion for new trial filed by new counsel which alleged, *inter alia,* that the confessions had not been fully true, that falsehoods had been "fed" to the defendants, who had been forced to make the statements and to incorporate those untruths as a result of threats, force and psychological pressures, which they were unable to resist because of lack of sleep and the effect of narcotics which they had been taking prior to their arrest and interrogation. Testimony was taken by the trial court, including the testimony of all three defendants as to the circumstances under which the statements had been obtained.[2] The trial court denied relief, 63 N.J. Super. 16, 163 A.2d 593 (1960), and the Supreme Court of New Jersey affirmed. 34 N.J. 212, 168 A.2d 1

[2] Relevant portions of the testimony of Petitioners Johnson and Cassidy have been printed in the Joint Appendix printed as part of the Transcript of Record in this Court. [T.R. 207-233]

(1961). This Court refused certiorari. 368 U.S. 933, 7 L.ed.2d 195 (1961).[a]

Defendants then filed a habeas corpus action in the United States District Court for New Jersey, raising, *inter alia*, the issue of whether the confessions had been voluntarily obtained. Judge Lane heard argument, but heard no testimony and then denied relief (although concluding that on another issue defendants had failed to exhaust their State remedies). After relief on the other ground was sought in and denied by the state courts, 38 N.J. 319, 184 A.2d 641 (1962), Judge Lane denied relief on this other ground and both his orders were appealed to the Court of Appeals for the Third Circuit. The Court of Appeals concluded that the statements of Godfrey had been illegally coerced, and granted the habeas corpus as to him, denying relief as to the other two defendants. 327 F.2d 311 (3d Cir. 1964). Judge Ganey dissented as to denial of relief for Cassidy. *Id.*, at 319. Relief on the alternate ground was also denied. 327 F.2d 320 (3d Cir. 1964). This Court denied certiorari on petitions filed by the State of New Jersey, 377 U.S. 977, 12 L.ed.2d 745 (1964), as well as by Johnson and Cassidy. 377 U.S. 984, 12 L.ed.2d 751 (1964). Mr. Justice Douglas was of the opinion that certiorari should have been granted.

Petitioners Cassidy and Johnson then instituted the present post-conviction relief proceeding. [T.R. 1-12] Relief

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[a] This Court also dismissed for want of a substantial federal question their appeal which raised the question of the validity of the New Jersey death penalty statute. 368 U.S. 145, 7 L.ed.2d 188 (1961). Attempts by Petitioners to obtain relief on other grounds were refused by the state courts: 71 N.J. Super. 506, 177 A.2d 312 (1962), affirmed, 37 N.J. 19, 179 A.2d 1 (1962); this Court again denied certiorari: 370 U.S. 928, 8 L.ed.2d 508 (1962).

was denied by the lower court after argument but without hearing testimony. [T.R. 13-82] On appeal to the Supreme Court of New Jersey, affidavits of both petitioners, along with others, supporting the factual allegations in the application for relief, were attached to the application [T.R. 365-385] and were considered by the Supreme Court of New Jersey as if offered for the trial court's consideration. [T.R. 346] The Supreme Court affirmed the denial of relief. 43 N.J. 572, 206 A.2d 732 (1964). [T.R. 345-364] This petition followed.

The testimony offered by all three defendants on their motion for new trial was uncontradicted, and the affidavits relating to the circumstances leading to their arrests and interrogations, filed in the habeas corpus proceeding and in the post-conviction relief proceeding, were not denied by the State of New Jersey, nor was any contradictory evidence offered by the State.

From their testimony and affidavits,[4] the following facts can be found relating to these incriminating statements.

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[4] As already noted in footnotes 1 and 2 *supra*, the portions of the testimony of the police officers given at the original trial which relate to the arrest and interrogation of these Petitioners, and the relevant portions of the testimony of these Petitioners themselves at the hearing on their motion for new trial, have been printed in the Transcript of Record herein, along with all of the relevant papers and affidavits filed in the lower court and the New Jersey Supreme Court in the post-conviction relief proceeding. The entire record of the trial was printed as a Joint Appendix consisting of three volumes covering 732 pages. Copies of this Joint Appendix were filed with this Court as Appendix C of the Petition for Certiorari filed in October Term, 1960, No. 1133 Misc. Where necessary to refer to material contained in these volumes, the citations herein will be preceded with the prefix "NJ/JA". Portions relevant to the habeas corpus proceeding, along with relevant portions of the testimony taken in support of the motion for new trial, were printed as part of the Joint Appendix consisting of

Statements of Stanley Cassidy

Cassidy was the second of the three defendants to be arrested. On Tuesday, January 28, 1958, at approximately 1:00 P.M., almost four days after Edward Davis had been killed, Wayne Godfrey had been arrested at the Little Click Cafe in Camden, in the company of Noah Hamilton. [T.R. 85-89] At approximately 4:00 A.M. the following morning Cassidy was taken into custody at his home in Camden by the seven officers of the Camden city and police forces: Captain of County Detectives Philip Large, County Detective William Large, City Detective Sgt. Vincent Conly (promoted to Lt. of Detectives by the time of trial), and City Detectives Golden Sunket, William O'Brien, Harry Tracy, and Nathaniel Jones. Of this group only Detectives Tracy and Jones testified at the trial concerning the details of the arrest. [T.R. 90-92] There was no testimony indicating that a warrant had been obtained for Cassidy's arrest.

According to the testimony at the trial, Cassidy was immediately taken to the Detective Bureau in the Camden City Hall. [T.R. 90] Detective Jones testified that on arrival at City Hall, Cassidy was turned over to members of the prosecutor's staff. [T.R. 92] During the next twenty hours, Cassidy made three formal statements to Detective Chief Dube, all of which were admitted into evidence at

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two volumes and containing 419 pages which were filed in the U.S. Court of Appeals for the Third Circuit, copies of which were also filed in this Court with the two Petitions for Certiorari numbered October Term, 1963, Nos. 1018 and 1322 Misc. Where necessary to refer to the testimony therein, the citations will be preceded with the prefix "CA/JA".

the trial. [NJ/JA 458a, 484a, 491a et seq.] Five hours elapsed between Cassidy's arrest and the beginning of his first formal statement. During that period he was questioned by several detectives. The intensity of the interrogation appears in Cassidy's testimony at the hearing on the motion for new trial. He was questioned continuously from the time he was arrested until he was taken to Detective Chief Dube's office at 9:00 A.M. [T.R. 227-229] He also testified at that hearing that he was physically abused. [T.R. 228] In his affidavit which is part of this record, unanswered and uncontradicted by any of the State's evidence, Petitioner Cassidy goes into greater detail about the physical and psychological pressures, the threats, implied threats and tricks to which he was subjected, and the failure of anyone to advise him of his rights. [T.R. 365-368]

At the new trial hearing, Cassidy testified that he was a heavy user of narcotics, that he was suffering effects of narcotics intoxication at the time of arrest. [CA/JA 355a-356a] Cassidy was 25 years old at the time of the trial. He had an 8th grade education and was chronically unemployed. He had never before been arrested or even questioned by the police. A psychologist at the State's Diagnostic Center at Menlo Park described Cassidy as "an extremely inadequate regressed and passive individual."[5] [CA/JA 33a] A psychiatric report from the same Center described him as a "highly conflicted, immature individual" with "deep feelings of incompetence." [CA/JA 29a-30a] He is also characterized as an "inadequate personality who

[5] These reports were attached to exhibits to the petition for writ of habeas corpus in the U.S. District Court and were printed in the two volume Joint Appendix filed in the Court of Appeals and also in this Court in that proceeding.

needed narcotics to alleviate his present anxieties. [CA/JA 34a] According to one psychological report, "of the three men, Cassidy is certainly the most passive, the most inadequate and at the present time the most repentent." [CA/JA 34a]

Nothing in the testimony of the officers disputes any of Cassidy's contentions. On the testimony of Chief Dube himself, it is clear that Cassidy was not warned of his constitutional rights. According to Chief Dube, after he introduced himself and the others present in the room to Cassidy, stated that Davis had been killed during a "hold up", and then stated "I am going to ask you some questions as to what you know about the hold up, but before I ask you these questions, it is my duty to warn you that everything you tell me must be of your own free will, must be the truth, without any promises or threats having been made to you, and knowing anything you tell me can be used against you, or any other person, at some further time." [NJ/JA 459a; T.R. 114] This warning did not advise him of his right to remain silent, of his constitutional right to counsel and to consult with counsel before making any statement, nor of his right to communicate with relatives or friends. It also did not advise him of his absolute right under New Jersey law to be taken before a magistrate without unnecessary delay.

In the first of the statements, Cassidy confessed that he, Godfrey and Johnson had gone to Davis' store to rob, but did not admit to a planned armed robbery. Two hours after the first statement, Cassidy was taken to Chief Dube's office again, and at 12:15 P.M. made a second statement in which he admitted, in contradiction of his first

statement, that he had carried a pistol when they went to the store. [T.R. 130 et seq.] At the new trial hearing, Cassidy testified that he had been tricked into telling the prosecutor that he had a gun at home by the statement that they simply wanted to see if it had been fired and by the promise that they would not use it in evidence against him if it had not been fired. [T.R. 232-233] In his affidavit he adds that he was promised by the prosecutor that after giving the statement he could contact his parents —a promise that was not kept. [T.R. 367]

His third statement was taken in Chief Dube's office at 11:40 P.M. that evening. [T.R. 135 et seq.] In this statement Cassidy, having been shown the weapon used to kill Davis, admitted that he had held the gun overnight for Johnson and returned it to him prior to the shooting. In his affidavit, Cassidy alleges that he again asked Chief Dube if he could telephone his mother, and was told that he could only if he completed the statement. [T.R. 367]

Cassidy also alleges in his affidavit that prior to the second and third statements he was allowed to talk to Godfrey who told him that he might as well confess because Godfrey had done so. [T.R. 367] Godfrey's confession was ruled invalid by the Court of Appeals.

Cassidy was not taken before a judicial officer until Friday, January 31, 1958, three days after his arrest. According to Cassidy's affidavit, when the judge learned that the police had not allowed him to contact his family so that they could obtain a lawyer, the judge told the prosecutor to let the defendants speak to their families. [T.R. 367-368]

Statement of Sylvester Johnson

Sylvester Johnson was the last of the three defendants to be arrested. He was apprehended in Newark, New Jersey, at the home of an uncle at 5:00 P.M. on January 29, 1958. [T.R. 93] The arresting officers, who went from Camden to get Johnson, including City Detective Sgt. Vincent Conly, City Detectives Harry Tracy, Nathaniel Jones, and William O'Brien, Camden County Detective Harry Gabor, and a detective identified in the record only by his last name, Dunn. [T.R. 93] There was a Newark detective in charge named Clayton B. Norris. [T.R. 380] Wayne Godfrey, who had already given the first of his statements held by the Court of Appeals to have been coerced, personally brought the police to this location. Of the entire group of arresting officers only Sgt. Conly and Detective O'Brien testified at the trial. [T.R. 93 et seq., 101 et seq.] The arrest occurred in the late afternoon on the date on which the two of the incriminating statements of Cassidy and the first of Godfrey, had already been recorded.

The arresting officers took Johnson to the Newark Detective Bureau where he was photographed, fingerprinted and questioned. [T.R. 93 et seq., 101 et seq.] Approximately five hours later he was taken before a municipal judge or magistrate in the same municipal building. [T.R. 93-95] Neither at the time of his arrest nor subsequently was he advised by anyone that he had the right to obtain counsel or to talk to an attorney or his family. No one advised him that he could remain silent. When taken to the court, he requested to see an attorney and to contact his family. Detectives Conly and Norris told him that he could see an attorney and talk to his family after he gave a confession. [T.R. 380]

What transpired at the arraignment does not appear in the record. Sgt. Conly testified that the Judge advised Johnson of his rights. [T.R. 95] Johnson's affidavit states that he believes Conly signed some papers and the judge asked the officers some questions. He was not advised of his right to see counsel, of his right to see his family, nor of his right to remain silent. He was not asked anything by the court or by anyone else, and was taken out after approximately ten minutes. [T.R. 380-381]

He was then taken back to the interrogation room and was questioned intermittently until approximately 1:30 A.M., Thursday, January 30, 1958 when he was returned to his cell. During the interrogation he again requested permission to speak to his uncle to arrange for a lawyer. Conly told him that he could not see or speak to anyone until he had given a confession. [T.R. 381]

Approximately 2:00 A.M. on January 30, 1958 three County detectives took him by automobile to Camden. [T.R. 95, 102] Detective William O'Brien drove, with Johnson sitting in the rear between Sgt. Conly and Detective Tracy. [T.R. 102] During the ride to Camden, he was questioned persistently and constantly. He denied knowledge of a murder or hold up, and asked to speak to his family so he could get a lawyer on arrival in Camden. [T.R. 381] Conly told him that he could not see anyone until after he told them what he wanted, and got angry during the ride because of his refusal to "cooperate" and punched him in his mouth. [T.R. 381] Conly admitted that on the ride from Newark to Camden Johnson was told that Cassidy and Godfrey had been picked up and named him as the trigger man. [T.R. 199-200]

On arrival in the Camden City Hall police station about 4:00 A.M., January 30, his interrogation was continued until 4:45 A.M. when he was taken into Chief Dube's office. There he was told that Godfrey and Cassidy had confessed and both Cassidy and Godfrey were brought in separately and identified him as the person who had actually done the shooting. Again, he asked if he could contact his mother to get a lawyer and again he was told he could see no one until he gave a statement. [T.R. 380-381] Finally, he gave a formal statement to Chief Dube which was later introduced at the trial.

Johnson testified that he was under the influence of narcotics at the time of the shooting and remembered nothing about it; he testified that the information contained in his statement was "fed" to him from the time he was interrogated in Newark until he gave the statement to Chief Dube. [T.R. 209] He also testified to physical mistreatment. [T.R. 226]

Johnson's background, character and mental equipment to endure physical and psychological pressures were disclosed from the State's own psychiatric reports. He was the youngest of the three suspects, being only 21 years of age at the time of the incident, and had only a 7th grade education. A State psychiatrist from the Menlo Park Diagnostic Center found that he exhibited "intense feelings of insecurity and inadequacy which were conspicuous throughout his entire life." [CA/JA 190a] A State psychologist characterized him as "an insecure, grossly inadequate, poorly integrated schizoid personality whose stability and judgment goes to pieces under douress [sic] and stress." [CA/JA 27a] The record shows in the transcribed statement that followed, Chief Dube began with

the same introduction that had been used with Cassidy, as well as Godfrey. [NJ/JA 555a] This contained no warning or explanation of his constitutional rights.

SUMMARY OF ARGUMENT

The circumstances of the interrogation of both of these petitioners by police, were such as to require the application of the doctrine of *Escobedo* v. *Illinois*. One of the petitioners, a Negro of limited education, with no prior experience in questioning by the police, and with limited psychological resources, was arrested by seven officers in the middle of the night, without a warrant, was subjected to continuous questioning as well as physical and mental pressures, was not advised of his right to see his family or consult with counsel, and was told that he had been implicated by another defendant, whose confessions were later held to have been unconstitutionally coerced. Although he was at all times in the same public building which contained the county courts, he was not taken before a judicial officer until three days after his arrest, long after the police had wrested from him three formal incriminating statements. The other petitioner, described by a state psychologist as an insecure, grossly inadequate and poorly integrated schizoid personality, was under the influence of narcotics when arrested and was then questioned continuously through the early hours of the morning, was confronted with several confessions of both other defendants, including one later held to have been coerced. He was subjected to physical abuse and mental pressures, was refused permission to consult an attorney or to see his family, and was not advised of his right to remain silent. Under these circumstances, the statements should be ex-

cluded, even though petitioners were tried prior to the decision of this Court in *Escobedo* v. *Illinois.*

The trial also took place prior to the decisions of this Court in *Malloy* v. *Hogan* and *Griffin* v. *California.* The prosecutor, in his closing speeches, suggested that unfavorable inferences be drawn by the jury from the failure of the defendants to take the stand and to state that they were sorry; the trial judge also instructed the jury of its right to draw unfavorable inferences. Although this type of comment and charge were authorized by the New Jersey statute in effect at the time of the trial, the petitioners were deprived of their constitutional privilege against self-incrimination, and the type of "evidence" created by the argument and charge affected the integrity of the fact finding process sufficiently to justify applying the principles of the *Malloy* and *Griffin* decisions. This is no less true even though the main issue contested was the penalty to be imposed by the jury—life imprisonment or the death penalty.

During the course of the trial there was introduced into evidence several statements obtained from petitioners as a direct result of their being confronted with the unconstitutionally coerced statement of a co-defendant. These products of official illegality should be excluded from this trial. At any rate, the coerced confessions of the co-defendant implicated these petitioners; yet they were admitted into evidence without deletion of the implicating references. Despite the cautionary instructions of the trial judge, these petitioners were irreparably harmed. It was the duty of the trial judge—or of the appellate courts—to grant them a new trial free from this prejudicial evidence.

In his summation the prosecutor so misstated and distorted the facts and made such inflammatory statements as to deprive petitioners of their right to a fair trial. In addition, the prosecutor argued extensively for the imposition of the death penalty in order to deter others from crime—an unfounded theory not based on evidence. This effectively deprived petitioners of their right to a fair determination of the penalty to be imposed.

Finally, the statements of one of the petitioners was obtained during the course, and as a product of, his unlawful detention, after his arrest without a warrant and without being granted a prompt arraignment as required by state law. The admission of such statements in evidence against him deprived him of his constitutional rights.

ARGUMENT

I.

In Light of the Circumstances of Petitioners' Interrogation by the Police, Their Incriminating Statements Were Constitutionally Inadmissible as Evidence Against Them Under the Principles of Escobedo v. Illinois.

Escobedo v. *Illinois,* 378 U.S. 478 (1964), establishes that a panoply of specific constitutional rights are operative against the States during police interrogation of suspects. As in *Escobedo,* statements were extracted from petitioners during police interrogation of them as murder suspects in violation of their constitutional rights. As in *Escobedo,* the admission into evidence of those statements requires invalidation of their convictions.

Prior to the *Escobedo* decision, admissibility of the fruits of police interrogation was gauged on a measure of coercion or involuntariness that derived from *Brown* v. *Mississippi*, 297 U.S. 278 (1936), based upon the general guarantee of due process of law of the Fourteenth Amendment. *Escobedo* makes clear that this is not the sole constitutional norm applicable to that stage of the criminal process. Specific provisions of the Bill of Rights are to be brought to bear, including the right to remain silent and the privilege against self-incrimination of the Fifth/Fourteenth Amendments and, above all, the right to counsel of the Sixth/Fourteenth Amendments.

In so holding, the Court did not make any sharp break with the past. An unmistakable process of development marks the line of cases from *Brown* v. *Mississippi*, *supra*, to *Haynes* v. *Washington*, 373 U.S. 503 (1963). Explicit recognition of the applicability of Fifth and Sixth Amendment bulwarks to the process of police taking incriminating statements is not in the least novel. See *Bram* v. *United States*, 168 U.S. 532 (1897), quoted in the *Escobedo* opinion, 378 U.S. at 485-486; *Gallegos* v. *Colorado*, 370 U.S. 49 (1962).[6]

This is not to say that the effect of the rationale in *Escobedo* is inconsequential. Focusing the particular provi-

[6] This Court has repeatedly noted the absence of counsel during interrogation as an element in determining whether there had been overreaching by the police. See *Gallegos* v. *Colorado*, 370 U.S. 49 (1962); *Reck* v. *Pate*, 367 U.S. 440 (1961); *Blackburn* v. *Alabama*, 361 U.S. 199 (1960); *Payne* v. *Arkansas*, 356 U.S. 560 (1958); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Haley* v. *Ohio*, 332 U.S. 596 (1948); *Ward* v. *Texas*, 316 U.S. 547 (1942); *White* v. *Texas*, 310 U.S. 530 (1940); *Chambers* v. *Florida*, 309 U.S. 227 (1940).

sions of the Bill of Rights on the particular circumstances of the interrogation process produces a sharper image of the contours of constitutionally permissible police conduct. It relates the process of the precinct station to the process of the grand jury room and the courtroom and other significant stages of the criminal prosecution. It identifies vividly the fundamental quality of interests of liberty that must be preserved.

To bring petitioners' cases within the rationale of *Escobedo* does not require that that decision be read as announcing any radical new constitutional doctrine. Thus, it does not require a sweeping interpretation, as some have said, that counsel must be present at all times during communication between the police and criminal suspects. It does not require an interpretation suppressing every statement of such a suspect under the privilege against self-incrimination. This Court's opinion in *Escobedo* repeatedly noted the decision there was made in light of all the circumstances of that case. An excessively broad, doctrinaire reading of the decision is unwarranted on the face of the opinion. The case is a measured step forward in the articulation of standards to govern police interrogation. Under those standards, the statements extracted from petitioners were taken in violation of their constitutional rights.

A. Comparison of the Facts of Escobedo With the Facts in Petitioners' Cases.

The particular facts in these cases, in sum, present a picture of overreaching by the officers of the State to an extent equal to, or greater than, that in *Escobedo*. "The terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it." *Culombe*

v. *Connecticut*, 367 U.S. 568, 581 (1961) (Opinion of Mr. Justice Frankfurter). Cassidy and Johnson stood helpless against that terrible engine. They needed and were denied the assistance of counsel. Because they lacked the aid of counsel, they were exploited for the information necessary to condemn them before the law. Each was made "the deluded instrument of his own conviction." See *ibid.* In short, they were effectively denied the privilege against self-incrimination. The helplessness of petitioners, their particular need for counsel to protect their rights, especially the right to remain silent in the fact of unyielding interrogators, is compellingly revealed in these cases.

1. *Stanley Cassidy's Statements.*

Stanley Cassidy was the object of a secret inquisition that lasted from 4 A.M. until midnight of January 29, 1958. [T.R. 90, 92, 135] During those twenty hours, he was subjected to a barrage of interrogation, including three statements, formally recorded by a court stenographer, taken at 9 A.M., [T.R. 113] 12:15 P.M., [T.R. 130] and 11:40 P.M. [T.R. 135] With no prior criminal record, even of arrest, Cassidy was completely disoriented from the world he knew and from which he might have found support. [T.R. 365; CA/JA 37a] He was surrounded by known hostile forces and subjected to coercing impingements and undermining, even if not obvious, pressures of every variety. He was completely at the mercy of those whose job it was to prosecute him.

Cassidy's solitary ordeal began with a dread middle-of-the-night arrest. The record shows no indication that the seven man squad of officers had or displayed a warrant. [T.R. 90-92] Cassidy was detained thereafter in the Cam-

den City Hall, the building that also houses the courts of Camden County. Although the courts were then in session in the very same building, his captors did not take him before any judicial officer. They were intent upon first securing from him iron clad evidence of first degree murder. In the prosecutor's words, "these confessions were merely the bow to dress up the knot that tied this whole package together." [T.R. 305] Toward this end, the police deliberately and calculatingly flouted the law. New Jersey requires that every person arrested must be taken before a magistrate without unnecessary delay. N.J.R.R. 3:2-3(a). Thus illegal detention followed apparently illegal arrest.

The cross-questioning to which Cassidy was subjected, as described in his own words, was too much for him to cope with alone:

> "When I first was locked up there was questions being asked of me from everyone in the room." [T.R. 229] I was questioned when I was picked up about armed robbery, and I tried to tell them that it was no armed robbery, and the officers, *they kept saying that it was an armed robbery, because they knew that we went there to rob the man, because Hamilton had told them that.* And, I said, 'Well, I don't know anything about any robbery.' [T.R. 227] (Emphasis added).
>
> "So, when I first got picked up, I was picked up by Officer Jones, Officer Sunkett and Large's brother, Phil Large, and a couple of other officers: so, they took me upstairs into the interrogating room and first thing they started, asked me where I had been all day and I told them that I had been around, and they asked me the things that I had done.

"So, they asked me did I use drugs, so at first I denied that I used drugs, so they kept on questioning me and questioning me, and everything, and so I finally admitted that I do use drugs.

". . . so, I was sitting there, so Phil Large, he jumped up, he said, 'I don't want to hear that there.'

"He said, 'You know what I want from you.'

"He said, 'I want to know about this robbery.'

"I said, I tried to explain to him that I knew nothing about no robbery. So, he kept on, got riled out and everything, threw a telephone book at me, and I blocked it with my hand. He was angry because he said I wasn't cooperating with him the way he wanted me to. He said, because I knew what he wanted, *because he already had a statement saying that I went to rob Mr. Davis.* (Emphasis added).

"So, I kept on telling him I didn't go to rob Mr. Davis out of anything. I went to the store with Sylvester to see about collecting a debt." [T.R. 227-228]

The psychological duress that can be brought to bear in the course of secret interrogation of a suspect, alone, without counsel or any friend to support him, is revealed in Cassidy's description of the police use of the specter of the electric chair to panic the suspect.

"The detectives, at one time, put some chairs together to show me what the electric chair looked like. They told me to sit in the chair with my arms on the arm rests and my legs and back firmly against the chair. I was told to sit up straight. Over my arms and legs were shackles like the electric chair. In back of my head they put a telephone book. I was told to imagine

over my head a mask, then they said: 'The switch is about to be thrown' and then said: 'It was thrown' and at that time one of them hit the book in the back of my head. I was frightened crazy." [T.R. 366]

Not only was Cassidy thus subjected to intensive interrogation by a battery of police officers, but he was also faced with the more subtle and difficult forms of pressure that skilled interrogators are wont to use. He was confronted with quotations said to have been taken from the confession of Wayne Godfrey allegedly implicating Cassidy, and to underscore the effect, the police brought Godfrey into the room briefly. [T.R. 366] Later, after his first formal statement had been taken, Cassidy was interrogated by the Prosecutor himself who induced Cassidy to disclose the whereabouts of a gun. The Prosecutor said that he only wanted to see whether the gun had been fired and that, if the gun had not been fired, Cassidy would be cleared of any murder charge. [T.R. 232-233, 367] It was impossible for Cassidy, without the aid of counsel, to understand the significance of the statements Godfrey had allegedly given to the police, to realize that any such statements could not be used as evidence against anyone other than Godfrey. Cassidy likewise urgently needed assistance of counsel to appreciate the inducements that the Prosecutor employed in seeking information about the gun.[7] The

[7] In the petition for certiorari filed in this case, a separate question was presented of the constitutionality of the admission into evidence of the gun discovered as a result of the Prosecutor's misleading assertions to Cassidy, that the police wanted the gun only to see if it had been fired, that it would not be used as evidence, and other inducements. The petition for certiorari was filed before this Court's decision in *Linkletter* v. *Walker*, 381 U.S. 618 (1965). Under the rationale of *Linkletter* it appears that

intricate web of a felony-murder prosecution being spun by the Prosecutor and police was totally beyond the comprehension of this hapless individual.

Cassidy was inherently unable to meet this situation without the guidance and support of counsel. He was a chronically unemployed Negro, twenty-five years old. His education had terminated at the eighth grade. During the four days before his arrest and interrogation, he had been using drugs "pretty heavy" and was weakened by the effects of narcotic intoxication. [CA/JA 355a-356a] Psychiatric and psychological experts at the State's own Diagnostic Center unanimously describe him as an inadequate personality: "a highly conflicted, immature individual", "deep feelings of incompetence", "anxiety and great dependence", "an extremely inadequate, regressed, passive individual." [CA/JA 28a-34a] His requests for counsel were unavailing. [T.R. 365, 367]

Three times during the twenty hours of illegal detention, the skilled Chief of County Detectives took question and answer statements, formally recorded by a court stenographer, from Cassidy. He did not have counsel to advise him. He inculpated himself in a robbery-murder. At the outset, the transcript indicates that the Chief of Detectives, an experienced interrogator, warned Cassidy that the should tell the truth of his own free will, knowing that the

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the admission of the gun into evidence in a 1959 case, which became a final judgment prior to the decision in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), does not provide a valid ground for relief to these petitioners. Accordingly, that contention has not been argued in this brief. This does not diminish the force of the contention that the situation posed a critical need for counsel on the part of Cassidy.

statement could be used against him. [T.R. 114] Cassidy was not advised by Chief Dube, or anyone else, that he had an absolute right to remain silent. Cassidy was not advised by Chief Dube, or anyone else, that he had a privilege against self-incrimination. Cassidy was not advised by Chief Dube, or anyone else, that he had a right to assistance of counsel.

Completely alone, cut off from family and friends, unlawfully deprived of liberty by police, denied any judicial hearing where he would have been advised of his constitutional rights, this wholly inadequate and ineffectual person desperately needed the assistance of counsel. "[W]e deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefit of his constitutional rights." *Gallegos* v. *Colorado*, 370 U.S. 52, 54 (1962). A lawyer could have given Cassidy the protection which his own weakness and inadequacy could not. "To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights." *Id.* at 54-55.

2. *Sylvester Johnson's Statement.*

Sylvester Johnson's need for the assistance of counsel to provide some semblance of significance to his constitutional rights was equal to or greater than Cassidy's. Twelve hours after his arrest, at 4:45 A.M., in the predawn hours of the morning of January 30, 1959, Johnson was made the instrument of his own destruction in the office of the Chief of Camden County Detectives. [T.R. 93, 201] The circumstances of Johnson's statement, like

those in *Escobedo*, render that statement inadmissible for lack of counsel to advise him meaningfully of his privilege against self-incrimination and his absolute right to remain silent despite the manifold pressures invoked by the police.

One of the most striking similarities between the plight of Johnson and that of Escobedo arose from the use by their interrogators of inculpatory statements previously taken from other defendants. The police themselves conceded that they told Johnson he had been named as the "triggerman" by Cassidy and the third defendant, Wayne Godfrey.[8] [T.R. 200] In both cases, the subjects of the immediate interrogation were confronted physically with the persons who had given the inculpatory statements. [T.R. 381] The legal nicety of this situation was particularly noted by this Court in *Escobedo*. The uncounselled laymen would assume that such statements could be used as damning evidence against him. Indeed, in Johnson's case, he was told by Chief Dube, quite incorrectly, that such statements could be used against the person who made it and other persons. [T.R. 184] Beyond the direct evidentiary harm that such statements might be thought to portend, this Court considered the likelihood that the person confronted with the accusation would naturally fear that silence in the face of the accusation could be taken as damning admission. Only a lawyer could advise such a person of the ramifications of the statements that had been made against him and the consequences that might follow if he remained silent or if he spoke.

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[8] The police also made use of information obtained from Noah Hamilton, a subsequent witness for the prosecution.

In *Escobedo* the Court found the need for counsel in this situation to be of the most significant importance. Even though the defendant there had previously conferred extensively with counsel, the lawyer's advice had not covered what the defendant should do in the face of an accusation by another defendant. Johnson, on the other hand, had not had the benefit of any discussion with any counsel at all. His requests for counsel were futile. He had had no legal advice on how to cope with anything the police might do to him, much less the legal import of the statements, apparently highly damaging to him, that the police had extracted from Cassidy and Godfrey.

Additional circumstances in Johnson's case made it urgent that the right to counsel be recognized with respect to his interrogation. Johnson was twenty-one years old at the time, a Negro who had left school at the seventh grade. Psychological and psychiatric experts at the State's Diagnostic Center stressed the inadequacy and insecurity conspicuous throughout his entire life. [CA/JA 17a-27a] One noted that his "stability and judgment go to pieces under duress and stress." [CA/JA 27a] Although he had one prior conviction, his experience did not begin to equip him with the background to protect his own rights. His pre-dawn interrogation in Chief Dube's office followed a middle of the night ride from Newark, where he had been arrested, to Camden. Fatigued from lack of sleep, he was further weakened by the effects of heavy use of narcotics for several days prior to his arrest. The mounting coercion, physical and psychological, applied to Johnson is evident in his description of what transpired in Newark and in the police car on the way to Camden.

"I was interrogated in Newark by three Camden detectives, two Newark detectives, and first they told me they wanted me for a murder.

"I told them that I did not know of any murder, and they kept questioning me and everything, and they said *'We know of the murder and we know you are involved.* There was a robbery' and at the time I did continue to deny it. (Emphasis added).

"So they said to me, they said, 'Cassidy and Godfrey and Noah Hamilton are in custody in Camden' and *they said they had statements saying that I committed a robbery.* (Emphasis added).

"At the time I told them, I said, 'Well, I know of the murder, but there was no robbery.'

"I said that I did not commit a robbery, and then I went on and told them exactly what had happened." [T.R. 207]

This came out in cross-examination by the prosecutor:

"Q. Did any officer beat you up?

"A. Yes, I was hit in Newark.

"Q. Hit in Newark?

"A. Yes, several times.

"Q. Did Chief Dube beat you up?

"A. Chief Dube?

"Q. Yes.

"A. No.

"Q. Did any other detectives beat you up while you were in Chief Dube's office?

"A. Not in his office.

"Q. What is that?

"A. Not in his office.

"Q. Where, did anybody beat you up in any other place?

"A. In Newark, and on the way coming to Camden." [T.R. 226]*

At the conclusion of the drive from Newark, Johnson was taken immediately to the office of Chief Dube. [T.R. 196-197] The interrogator gave his stock warning that the prisoner should tell the truth of his own free will, knowing that the statement could be used against him and others. [T.R. 184] Chief Dube did not advise Johnson of his constitutional privilege against self-incrimination and his absolute right to remain silent. Nor did he advise Johnson of his right to consult with counsel before making a statement. In total ignorance of his legal rights, this young, poorly educated Negro—debilitated by interrogation, lack of sleep and the after-effects of narcotics, isolated from family and friends, a person in whom insecurity and inadequacy were conspicuous—faced the skilled inquisitor and forfeited his life. Such a person, in these circumstances, has an overwhelming need for the guiding hand of counsel. [T.R. 381-382]

On the totality of the circumstances in their cases, petitioners Cassidy and Johnson, like the petitioner in *Escobedo,* were denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment. The incriminating statements elicited by the police during their

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*The witness did not accept the prosecutor's invitingly leading description of the extent of the physical violence. It would obviously be better for Johnson's case if he could testify truthfully to having been "beaten up". However, he did not accept the prosecutor's phrase, but testified only to the simple fact that he had been hit, several times, in Newark and coming to Camden.

interrogation may not be used against them at a criminal trial.

B. Absence of a Problem of "Retroactivity".

The Supreme Court of New Jersey rested its decision denying relief under *Escobedo* entirely on the ground that "*Escobedo* stands for a new rule of constitutional law which does not depend on voluntariness" [T.R. 394], that the new rule is "calculated to prevent police interrogation, without the presence of counsel, of a suspect accused of crime" [T.R. 356], and that such a new rule, whose purpose can only be deterrence of illegal police conduct, should not be given retroactive effect.[10] By an unwarranted and unduly broad statement of the "rule" of *Escobedo*, the State court artificially created an apparent problem of retroactivity.

The illusoriness of the retroactivity issue is revealed if *Escobedo* is read, as this Court's opinion repeatedly directed, in light of the facts of the case. As noted earlier, *Escobedo* is well within the line of precedents of this Court dealing with the inadmissibility of pre-trial statements of defendants under the rubric of involuntariness. There are no major distinctions between *Escobedo* and, for example,

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[10] The New Jersey Supreme Court also intimated that no question arises as to the reliability of the determination of petitioners' guilt. [T.R. 335] The court rests this in part on the trial strategy of defense counsel. The soundness of counsel's decision, in light of the information and resources available to them, need not be re-examined. Suffice it to say here that, since 1960, petitioners have denied the truth of the confessions and continue to do so. They testified that they went to the victim's store to get money, in payment of a debt, rather than the version developed under police interrogation, that they went to rob. Since their convictions rest on a felony-murder theory, the difference is crucial, a matter of life and death.

Haynes v. *Washington*, 373 U.S. 503 (1963); or *Lynumn* v. *Illinois*, 372 U.S. 528 (1963); or *Gallegos* v. *Colorado*, 370 U.S. 49 (1962); or *Haley* v. *Ohio*, 332 U.S. 596 (1948). In 1960, this Court declared that the doctrine excluding from evidence coerced confessions was a many faceted rule. "Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case." *Blackburn* v. *Alabama*, 361 U.S. 199, 207 (1960). *Escobedo* expands on the shorthand by articulating that the right to counsel and the privilege against self-incrimination are factors that operate in the detention room at the police station.

During most of the life of the constitutional exclusion of unlawfully extracted confessions, it was not accepted that any of the specifics in the Bill of Rights dealing with criminal prosecutions applied to the States. Exclusion rested upon the Due Process Clause of the Fourteenth Amendment. In recent years, this Court has come to the view that the vital provisions of the Fourth, Fifth, Sixth, and Eighth Amendments do govern State criminal process.[11] It is a not unexpected development, therefore, that the early doctrine on admissibility of confessions would be recast and rearticulated in light of the privilege against self-incrimination and the right to assistance of counsel.[12]

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[11] E.g., *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Robinson* v. *California*, 370 U.S. 660 (1962).

[12] A similar evolution occurred in the development from *Powell* v. *Alabama*, 287 U.S. 45 (1932), to *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). No serious problem of retroactivity was found to exist.

In so doing, the Court has not shattered any existing constitutional rules; it has not overruled any established precedents; it has not invented any far-reaching and dramatic new doctrine. *Escobedo,* properly interpreted in light of the circumstances of that case and the pre-existing norms on the eliciting of incriminating statements, gives rise to no problem of retroactivity.

The admissibility of the incriminating statements elicited from petitioners Johnson and Cassidy might be measured on the pre-*Escobedo* formula which wove together a complex strand of values into the convenient shorthand expression of involuntariness. On the basis of this Court's decisions, their confessions were "involuntary". *Haynes* v. *Washington, supra; Lynumn* v. *Illinois, supra; Gallegos* v. *Colorado, supra.* It is not necessary any longer to use the old shorthand, however. Under *Escobedo* it is equally true that, on the particular facts of these cases, they have been denied their privilege against self-incrimination and their right to assistance of counsel at a crucial stage of the proceedings against them.[13]

[13] Compare *Pointer* v. *Texas,* 380 U.S. 400 (1965).

II.

The Prosecutor's Comments and the Trial Court's Charge to the Jury on the Failure of the Defendants to Testify Deprived Petitioners of Their Constitutional Rights Against Self-Incrimination, and Their Convictions Should Be Reversed Even Though They Were Tried Prior to the Decisions of this Court in Malloy v. Hogan and Griffin v. California, and Even Though the Major Contested Issue Was the Choice Between Imposition of Life Sentence or the Death Penalty.

Petitioners were tried in January, 1959, prior to the decisions of this Court in *Malloy* v. *Hogan*, 378 U.S. 1 (June 15, 1964) and *Griffin* v. *California*, 380 U.S. 609, 14 L.ed.2d 106 (April 28, 1965). During the trial none of the defendants took the stand to testify concerning guilt or penalty.[14] In fact, the defendants did not offer any evidence at all to contest their guilt or to assist the jury in arriving at the penalty.[15] In his closing summations to the jury, the prosecutor made comment upon this failure. In his first closing speech, the prosecutor argued:

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[14] New Jersey does not provide a "split verdict" trial, as do many other states, including California. See *Griffin* v. *California*, *supra*, 380 U.S. at 609, 14 L.ed.2d at 107, fn. 1.

[15] At the time of the trial, New Jersey decisional law did not permit the defense to offer background evidence in order to assist in the determination of penalty. See *State* v. *Wise*, 19 N.J. 107, 115 A.2d 62 (1955). After the conviction of the petitioners had been affirmed by the Supreme Court of New Jersey, and while a motion for new trial was pending, the Supreme Court of New Jersey rendered a decision in *State* v. *Mount*, 30 N.J. 195, 152 A.2d 343 (1959), which reversed a conviction because background evidence had been rejected. Petitioners' subsequent attempts to obtain relief on the basis of the *Mount* decision proved futile. 34 N.J. 212, 168 A.2d 1 (1961), cert. denied, 368 U.S. 933, 7 L.ed.2d 195 (1961); 37 N.J. 19, 179 A.2d 1 (1962), cert. denied, 370 U.S. 928, 8 L.ed.2d 508 (1962).

"At this point, at this point in my summation, in these opening remarks, I would devote my next few moments to discuss the evidence that might have been presented by the defense, but I am not going to do that. I am sure you follow me in my reasoning. It is very simple reasoning. The reason I am not going to discuss the defense is because there was no defense to the State's case. I say to you, most respectfully, that the State proved its case beyond, beyond any reasonable doubt. The State proved its case beyond any doubt. The defendants chose not to take the stand in their own defense. That was their right. They have a right under the law not to take the stand. However, the Court will charge you as the law that where the defendants refuse to take the stand in their own defense, that from their failure to testify in their own behalf, you, the jury, may infer that they could not truthfully deny the incriminating facts that were proved against them. I will leave that to you and perhaps comment upon it later." [T.R. 255-256]

There was no objection by defense counsel because this type of comment was specifically rendered permissible by New Jersey law.[16] However, it did provoke responses from

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[16] New Jersey Statute, N.J.S. 2A:84A-17, Rule 23, (4), provides: "If an accused in a criminal action does not testify after direct evidence is received of facts which tend to prove some element of the crime and which facts, if untrue, he could disprove by his own testimony, counsel and the judge may comment on his failure to testify, and the trier of fact may draw an inference that the accused cannot truthfully deny those facts." The precursor of this Statute received the judicial approval of the New Jersey Supreme Court in *State* v. *Colby*, 28 N.J. 106, 145 A.2d 289 (1958). As noted by this Court in *Griffin, supra*, 380 U.S. at 611, 14 L.ed.2d at 108, fn. 3, the Constitution of New Jersey does not contain any provision embodying the privilege against self-incrimination.

counsel for each of the defendants. Pinioned on the twin horns of the dilemma caused by the state law's prohibition against introducing background evidence to mitigate the penalty, and the right of the prosecutor and court to testify on the failure of defendants to take the stand, the helpless defense counsel in their summation were forced to concede the guilt of their clients and attempt to plead for mercy on the ground that there had been no plan to murder, but only to rob. In the final closing speech the prosecutor drove the knife home—and twisted it—when he argued:

"Ladies and gentlemen, now I hear, and now I understand why they said nothing last Friday when they opened, why these attorneys didn't make any claim for a defense. Now it is crystal clear. Now they finally admit. What was there to deny? The State had proven a clear case. The defendants had confessed to it. We merely are here as observers. This is the situation and now they don't even take the opportunity to get on the stand. Why speaks for these defendants? Are the attorneys speaking for the defendants? And why shouldn't the defendants speak for themselves; when someone says that he is sorry or he is sorry or he is sorry, why don't we have the opportunity to hear whether or not they are sorry? This they denied themselves. They denied it to you and to everyone else, the opportunity to hear for themselves. Wouldn't this have indicating some sorriness on their parts? They wouldn't expose themselves on the stand. They didn't dare get on the stand. They would rather hide behind some self-serving statement snatched out of context or otherwise in a confession. They didn't dare take the stand and bare their breasts and say we are

> sorry. Therefore, you have a right, and intelligently so and logically so, to say the reason they didn't take the stand is because they could not truthfully deny the incriminating evidence proved against them, and the Court, I trust, will charge you the law on this situation." [T.R. 305]

As expected, the trial judge in charging the jury lent weight to the prosecutor's argument. Even though he did instruct the jury that failure of a defendant to testify on his own behalf raises no "presumption of guilt," and should not be considered as prejudicial in determining penalty [T.R. 332], he went on to add:

> "If any inculpatory or incriminating facts are testified to which concern the acts of that particular defendant which he could by his oath deny, his failure to testify in his own behalf raises an inference that he could not truthfully deny those inculpatory or incriminating facts." [T.R. 332]

Although New Jersey law prevented defense counsel from successfully objecting to this type of summation and charge, on direct appeal of the convictions, the Supreme Court of New Jersey was apparently disturbed by the totally inflammatory nature of the remarks of the prosecutor, and on its own motion[17] it requested consideration of the propriety of the prosecutor's summation. This was argued on supplemental briefs. Nonetheless, that Court concluded that the prosecutor's remarks "did not prejudice the substantial rights of the defendants." 31 N.J. at 512, 158 A.2d at 24. However, the consideration of this question

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[17] See 31 N.J. at 510, 158 A.2d at 22.

was based entirely upon domestic law of New Jersey. Until the present post-conviction application, the question was never raised in terms of the requirements of the Constitution of the United States.

Although the Supreme Court of New Jersey, after the decision of this Court in *Malloy* was raised by petitioners in this post-conviction proceeding, still had some doubt as to whether *Malloy* forbade the type of comment indulged in by the prosecutor and the charge rendered by the trial court here,[18] such doubt has clearly been laid to rest by the decision of this Court in *Griffin*. Nonetheless, two questions remain unanswered: first, are these decisions applicable to cases which were tried prior to their announcement; and second, do they apply where the main issue contested is the penalty to be imposed, even though the question of guilt or innocence necessarily remained.

A. *Retrospective application.* This Court has already heard argument, and may even render a decision before argument in the instant case, in a case which raises a similar issue. In *Tehan* v. *Shott*, October Term, 1965, No. 52, the remarks of the prosecutor in that case were mild compared to the prosecutor's comments in this case; furthermore, in *Tehan* there was no instruction by the Court supporting those remarks, as there were in the case at bar. The conviction was affirmed by the Ohio Court of Appeals and the Ohio Supreme Court, with certiorari being denied by this Court. On collateral attack by writ of habeas corpus in the federal courts, the United States District Court dismissed the writ. The appeal was argued in the Court of Appeals for the Sixth Circuit the day after this Court's

[18] See T.R. 358-359.

decision in *Malloy*; the Court of Appeals properly interpreted the *Malloy* decision and reversed and remanded to the District Court, which in turn remanded to the state courts for appropriate action within ninety days. No steps were taken to stay the effectiveness of the District Court's order; nonetheless, a petition for certiorari to review the order of the Court of Appeals was filed in this Court. Subsequently, the decision in *Griffin* was announced. Shortly thereafter this Court granted certiorari in *Tehan*, requesting argument on the retroactivity of the *Griffin* doctrine.

One very significant distinction between *Tehan* and the case at bar (besides the more damaging nature of the comments and charge in the case at bar) is the fact that in *Tehan* the appellate court found that *Malloy* applied, while here the appellate court concluded that it did not. Each arose by collateral attack, rather than direct appeal; in each the collateral attack on the prosecutor's comments was initiated prior to the *Griffin* decision.[19]

In *Tehan*, counsel for Respondent vigorously urged that no issue of retroactivity was involved, since the decision of the Sixth Circuit, correctly anticipating the doctrine of *Griffin*, was rendered prior to this Court's opinion in that case.[20] If he is correct, then the same principle is applicable here. No rational distinction in result can be grounded

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[19] It is true that in *Tehan* the collateral attack was also initiated prior to the decision in *Malloy*, while here it was not filed until after the *Malloy* decision. However, it is interesting to note that this Court did not deny certiorari from the decision of the Third Circuit until June 15, 1964—the very day that it announced the decision in *Malloy*.

[20] Brief of respondent, *Tehan* v. *Shott*, Oct. Term, 1965, No. 52, pp. 11, 13-16.

upon whether the appellate court whose decision is being reviewed in this Court found for or against petitioner—or, in other words, whether the state or defendant is the moving party in this Court.

Significantly, it must be noted that the comments made by the prosecutor and the trial court here were demonstrably more prejudicial and inflammatory,[21] since they not only related to a lack of defense, but they suggested that defendants were not even sorry about the crime. This, along with the totally inflammatory nature of the summation, raises questions of due process as well as privilege against self-incrimination. By the use of a trained and fertile imagination, the prosecutor was able to suggest to the jury inferences not arising from any evidence but merely from failure of defendants to testify or present evidence—inferences which may be just as untrue as facts obtained by coerced confessions. As noted by this Court in *Malloy*, coerced confessions are excluded not solely because of the fear that they may be inaccurate, but because they run counter to the accusatorial, rather than inquisitorial, system of criminal prosecution in America. For reasons already advanced in this brief, Argument I *supra*, and for reasons advanced in the cases to be argued at the same time, the principle relating to coerced confessions should be applied retrospectively. The rationale applies equally forcefully to reversing convictions obtained by unconstitutional self-incrimination as to those obtained by coerced confessions.

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[21] Not only did prosecutor comment about failure to testify, but his entire summation was highly inflammatory. See Argument V, p. 55, *infra*.

In refusing to apply the exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961) retroactively, this Court suggested in *Linkletter* v. *Walker*, 381 U.S. 618 (1965) that tangible evidence obtained illegally was no less true because obtained in an unconstitutional manner. However, where evidence has been *created* by the fertile imagination of a trained, experienced prosecutor, in violation of the constitutional rights of defendants, the fear expressed in *Linkletter* of taxing the administration of justice is far outweighed by the same principles of justice which require the retroactive application of due process decisions: "the principle that we applied went to the fairness of the trial—the very integrity of the fact finding process." 381 U.S. at 639. It is that integrity of the fact finding process which was assailed by the prosecutor's and trial court's unconstitutional conduct here.

B. *Applicability to Penalty.* The Supreme Court of New Jersey concluded that the comments of the prosecutor and the trial court could not have influenced the jury in its determination of the defendant's guilt, and that since the trial court had instructed the jury not to consider the failure of defendants to testify in determining whether to recommend life imprisonment,[22] this "could not have ad-

[22] "None of the defendants took the stand to deny their participation in the crime. Under our law, a defendant cannot be compelled to testify but he is competent to testify, and he has a right to testify, and his failure to be a witness in his own behalf is no presumption of guilt and does not erase the presumption of innocence. The failure of the defendants to take the witness stand should not be considered as prejudicial in respect to your determination as to whether or not you should attach to your verdict the recommendation of life imprisonment, in case you, the jury, should find any of the defendants guilty of murder in the first degree." [T.R. 332]

versely affected defendants' rights to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." [T.R. 359] In effect, the Supreme Court of New Jersey was thus applying a doctrine of "harmless error." This was palpably wrong for three reasons. First, it ignores the fact that *Malloy* and *Griffin* were not based on considerations of due process, but of applicability of the privilege against self-incrimination. There can be no question but that constitutional rights apply to the sentencing procedure as well as to determination of guilt or innocence. *Townsend* v. *Burke*, 334 U.S. 736 (1948). Accuseds are entitled to have counsel at every stage of the proceedings against them, including sentencing: *Petition of Ellisor*, 293 F.2d 175 (5th Cir. 1956); *Green* v. *Robbins*, 218 F.2d 192 (1st Cir. 1954). This is even true after a plea of guilty. *Townsend* v. *Burke, supra.* There can be no rational reason for denying to a defendant the constitutional privilege against self-incrimination once his guilt has been judicially determined. This is vividly underscored in the case at bar where the major issue presented by defense counsel to the jury was the choice between life imprisonment and the imposition of the death sentence—and the jury was deprived of the opportunity of hearing background evidence[23] and the statute establishes no standards to be applied in determining which penalty to impose.[24]

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[23] See footnote 15, *supra.*

[24] The failure of the statute to establish standards was attacked by these petitioners in the Supreme Court of New Jersey where, on appeal from the lower court's denial of motion for new trial, it was contended that the statute was unconstitutional, denying due process and equal protection. This contention was rejected. 34 N.J. 212, 168 A.2d 1 (1961). An appeal to this Court was dismissed for want of a substantial federal question. 368 U.S. 145, 7 L.ed.2d 188 (1961).

Second, no matter what tactic the defense followed, the jury was not, and could not be, relieved of its responsibility to determine whether defendants were guilty of the specific crime charged. N.J.S. 2A:113-4. The inferences suggested by the prosecutor and Court which they created from the failure of defendants to testify, may have affected the fairness of the jury's determination of guilt as well as penalty.

Third, the New Jersey Supreme Court's "harmless error" rationale conflicts with this Court's decisions that constitutionally objectionable evidence cannot be considered "harmless." See *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), where the Court cited *Silverthorne Lumber Co.* v. *United States*, 151 U.S. 385 (1920); *Nardone* v. *United States*, 308 U.S. 338 (1939); and *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

III.

Where the Confession of One Defendant, Later Held to Have Been Obtained in Violation of the Constitutional Rights of That Defendant, Led to the Confessions of Both Petitioners, the Admission of Their Confessions Is an Unconstitutional Deprivation of Their Rights.

Here the Court of Appeals for the Third Circuit held that the formal statements of Wayne Godfrey, given at 10:25 A.M. on Wednesday, January 29, 1958 [NJ/JA 506a, et seq.] less than nine hours after he was arrested, and at 11:15 P.M. that evening, [NJ/JA 540a, et seq.] were obtained from him through an unconstitutional use of physical and mental coercion. 327 F.2d 311 (3d Cir. 1964). Petitioner Johnson was arrested when Godfrey who had already given the first of his statements, brought the police to the home of Johnson's uncle in Newark. [T.R. 93] According to Johnson, he was told that Godfrey and Cassidy had already confessed and they were brought in to identify him as the one who had actually done the shooting. [T.R. 380-381] Thus, it is clear that Godfrey's confession played an important role in inducing Johnson to implicate himself.

The facts are not as clear with respect to Petitioner Cassidy. According to Cassidy's affidavit, he had at first refused to make a statement, and then continued to deny everything, despite continuous questioning and threats. Finally, one of the detectives read him quotations from some written statements, and told him that Wayne Godfrey had said he was involved. "They said they knew everything and that I might as well tell them the truth." Then they brought in Wayne Godfrey to identify him, without allowing them to speak to each other. [T.R. 365-366] Although the first of Godfrey's recorded statements which were intro-

duced into evidence did not commence until 10:25 A.M., he had already been interrogated for over 20 hours, and it is reasonable to infer that Godfrey had already made statements incriminating Cassidy and Johnson. Actually, however, Cassidy was the first to give a formal statement, which commenced at 9:00 A.M. and ended at 10:20 A.M. [NJ/JA 456a et seq.] As already noted, Godfrey's first formal statement commenced at 10:25 A.M.—only five minutes after Cassidy finished giving his first—and concluded at 12:00 Noon. [NJ/JA 539a] This seems to confirm Cassidy's affidavit that "about an hour or so" after his first statement he was taken to a room where Godfrey told him that he had confessed. [T.R. 367] Then he was taken to another room, questioned some more about the gun, and a second statement was taken. [*Ibid.*] According to the stenographer, Cassidy's second statement commenced at 12:15 P.M. [NJ/JA 482a] Thus, it appears that Godfrey's oral admission and his presence were used to induce Cassidy into believing that Godfrey had incriminated him; that this impression statement was then used to extract confessions from Cassidy.

Since the Court of Appeals has held that Godfrey's statements were obtained in violation of his constitutional rights, it follows that not only may that statement not be admitted into evidence against him, but it may not be constitutionally utilized as a tool for obtaining evidence from others. The language of this Court in *Fahy* v. *Connecticut*, 375 U.S. 85, 91 (1963), is highly relevant:

> "As the Court has noted in the past: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.' See Silverthorne Lumber Co. v. United

States, 251 U.S. 385, 392, 64 L.ed. 319, 321, 40 S.Ct. 182, 24 ALR 1426; see also Nardone v. United States, 308 U.S. 338, 84 L.ed. 307, 60 S.Ct. 266; Wong Sun v. United States, 371 U.S. 471, 9 L.ed.2d 441, 83 S.Ct. 407. Thus petitioner should have had a chance to show that his admissions were induced by being confronted with the illegally seized evidence."

We are not here attempting to relitigate the issue tried on the direct appeal in this case—namely, that the admission of Godfrey's confessions prejudiced them—as the Supreme Court of New Jersey apparently thought. [T.R. 363] Nor are we quarrelling with the findings of the Third Circuit as to Cassidy and Johnson on the record then before that court—as the Supreme Court of New Jersey also apparently thought. [T.R. 362] On the contrary, we are here suggesting that on the record before this Court, containing the affidavits of petitioners as well as the other evidence above referred to, and which is not contradicted by anything in the record, the statements of petitioners were obtained by use of unconstitutionally obtained evidence.

Nor are we trying to assert on behalf of these petitioners the constitutional rights of a third person, Godfrey. In *Wong Sun* v. *United States,* 371 U.S. 471 (1963), there were two petitioners. One, named Toy, had been arrested without a warrant under circumstances which led this Court to conclude that the arrest was unlawful. Accordingly, this Court excluded from evidence not only his statements to the police immediately after his arrest, but also the narcotics which they found in the possession of another individual named Yee, who they learned about from Toy. The

Court held that the discovery of the challenged evidence had not become so attenuated as to dissipate the taint of the original illegality, and that the evidence was come at by the exploitation of that illegality. As to the other petitioner, Wong Sun, however, a different conclusion was reached. Yee had told the agents that he had obtained the narcotics from "Sea Dog," and Toy identified "Sea Dog" as being Wong Sun. He then took them to Wong Sun's neighborhood where they located and arrested Wong Sun. Yee was called as a witness at their trial, but repudiated the statement he had given, and invoked his privilege against self-incrimination. No testimony was elicited from him identifying either petitioner. The Court held admissible as to Wong Sun the narcotics surrendered by Yee, even though it had been held inadmissible as to Toy.

> "The exclusion of the narcotics as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee. The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial." *Id.* at 492. [Citations and footnote omitted.]

It is respectfully submitted that this case does not sanction the use of confessions obtained as a result of trickery and use of illegally obtained evidence. The obtaining of the statements from Johnson and Cassidy here was not so attenuated as to dissipate the taint of the illegality of Godfrey's arrest, detention and questioning. These statements were come at by the direct exploitation of that illegality. Unlike Wong Sun's situation, we are claiming

official impropriety in the obtaining of the statements from the persons against whom they are being used—namely, the utilization of unconstitutionally obtained evidence as a tool for obtaining the confessions of these petitioners. Where, as in *Fahy*, the illegally seized evidence inducted the admissions and confessions, then the admissions and confessions can no longer be considered "voluntary" in the constitutional sense. This is but a variant of the practice condemned in *Johnson* v. *Pennsylvania*, 340 U.S. 881 (1950), where the defendant's acquiescence in the coerced confession of a co-felon was held inadmissible.

IV.

Where Motions for Severance Are Denied, and Three Defendants Are Tried Jointly, and the Confessions of Each, Expressly Implicating the Others, Are Admitted into Evidence Over Objection, and Where Two of the Confessions Given by One of the Defendants Are Held to Be Coerced, Justice Requires That the Other Defendants Be Granted a New Trial Free From the Prejudicial Effect of the Coerced Confessions.

The three defendants gave six formal statements to the police after their arrest. Copies of these statements were ordered supplied to defense counsel by the Supreme Court of New Jersey on an interlocutory appeal. 28 N.J. 133, 145 A.2d 313 (1958). Each statement expressly implicated the other defendants. [See NJ/JA 458a, 485a, 492a, 508a, 541a, 555a, et seq.] Pre-trial motions for severance [NJ/JA 2a-3a] were denied [NJ/JA 4a], as were defense motions made during the trial to strike out objectionable and hearsay references. [NJ/JA 405a, 418a, 441a, et seq.] The Supreme Court of New Jersey, on direct appeal, af-

firmed the action of the trial court, concluding that the trial court had not abused its discretion, that the confessions were not in dispute on essential elements of the crime, that separate trials would have created almost insurmountable problems of administration, and that the trial judge gave instructions to the jury limiting the consideration of the confessions to the person giving them. 31 N.J. 489, 158 A.2d 11 (1960).

Subsequently, the two statements given by co-defendant Godfrey were held by the Court of Appeals for the Third Circuit to have been coerced. 327 F.2d 311 (3d Cir. 1964), cert. denied, 377 U.S. 984, 12 L.ed.2d 751 (1964).

Even if there had been no violation of the petitioners' constitutional rights in the utilization of the coerced confessions as a tool for obtaining damaging admissions from the petitioners, still the petitioners have been substantially harmed by the submission to the jury of this constitutionally inadmissible evidence—despite all of the limiting instructions by the trial judge. Not only did Godfrey's statements supply verification of the admissions in petitioners' own statements, but it cast blame on the others. For example, in his first statement Godfrey told how Cassidy told him that Johnson had killed the man. [NJ/JA 512a] He recounts how Johnson said "I had to kill him, I had to shoot him." [NJ/JA 513a] In his second statement he tells about two guns in the possession of Petitioner Cassidy. [NJ/JA 543a-544a] Both statements are replete with evidence implicating the other two defendants. [See NJ/JA 508a-551a; also, 441a et seq.]

It is a legal fiction to believe that the jury in this case was able to separate the confessions of each of these de-

fendants and compartmentalize them.[25] Justice Traynor, speaking for the California Supreme Court, has recently written a lucid and logical criticism of the use of joint trials in circumstances similar to that involved here. *People* v. *Aranda*, —— Cal. 2d ——, 34 U.S.L. Week 2261 (Nov. 12, 1964): Although recognizing that joint trials have been approved in the federal courts, *Delli Paoli* v. *United States*, 352 U.S. 232 (1957), he notes criticism of the procedure. He points out that it results in serious impairment of the rights of the accused to a fair consideration by an impartial jury of the competent evidence produced against him; it is a fiction and a naive assumption about the way juries can function; the rule calls upon the jury to perform a mental gymnastic which is beyond, not only their powers, but anyone's powers. He goes on to quote Justice Frankfurter, writing for four dissenters in *Delli Paoli*,[26] *supra*:

> "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. . . . The Government should not have the windfall of having the jury be influenced by evidence against a defendant

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[25] The New Jersey Supreme Court has very recently recognized the potential prejudice in admission of such confessions, despite cautionary instructions, especially where deletions have been refused. *State* v. *Young*, —— N.J. ——, —— A.2d —— (A-24, Sept. Term, 1965, Dec. 20, 1965).

[26] "Because of these close parallels between *Jackson* and *Delli Paoli*, *Jackson* may foreshadow a holding that the *Delli Paoli* procedure violates due process." 78 HARV. L. REV. 211, 213. See *Jackson* v. *Denno*, 378 U.S. 368, 388, 389 (1964).

which, as a matter of law, they should not consider but which they cannot put out of their minds. (p. 248.)"

He notes further:

"To these critics, the rule is not basic to our jury system and is not needed to preserve the system. Instead, it is a rule that perverts the jury trial since it calls upon ordinary lay people to obey an instruction that every judge realizes cannot be obeyed. It fosters what one scholar refers to as our 'inconsistent attitude' toward juries. We treat them 'at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects.' (Morgan, Some Problems of Proof under the Anglo-American System of Litigation (1956) p. 105.)

Whether or not these criticisms of the present rule require its abrogation, a question we consider later herein, they clearly foreclose any assumption that error in admitting a confession that implicates both defendants is rendered harmless to the nonconfessing defendant by an instruction that it should not be considered against him."

Justice Traynor goes on to point out the constitutional infirmity in relying upon the jury's ability to make this distinction:

"Although *Jackson* [*Jackson* v. *Denno,* 378 U.S. 368] was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant's guilt, its logic extends to obviating the risks that the jury may rely

on any inadmissible statements. If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.

"Indeed, the latter task may be an even more difficult one for the jury to perform than the former."

He concludes by pointing out the impossibility of the task:

"In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' (People v. Chambers, 231 Cal. App. 2d 23, 33.) It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A."

We are not here urging that all joint trials are improper, nor even that the trial judge abused his discretion in refusing the severance prior to the trial.[27] However, we are

[27] Despite this, it was clear even at that early date that the confessions implicated each of the other defendants, since they had

suggesting that the trial judge should have deleted the cross-incriminating references in each statement; failing that, as this Court has noted, the trial judge has a "continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer* v. *United States*, 362 U.S. 511, 516 (1960). It is submitted that at least by the close of the trial, when all of the statements had been read into the record without deletions, the trial judge had the duty of granting the severance.[25] Failure of the trial court to take either of these protective steps rises to constitutional dimensions.

Certainly, now that two of the confessions have been ruled constitutionally inadmissible, the prejudicial effect of the cross-incrimination contained therein is exacerbated. It is thus the duty of the appellate courts to grant the relief previously denied by the trial court.

In *Pointer* v. *Texas*, 380 U.S. 400 (1965) and *Douglas* v. *Alabama*, 380 U.S. 415 (1965), this Court held that the Sixth Amendment's guarantee of the right to confrontation forbids the use in state courts of transcript of a witness' testimony given at a preliminary hearing where that witness had moved and become unavailable and the confession of an accomplice who had been found guilty at a separate trial and invoked his privilege against self-incrimination at this defendant's trial. It is thus abundantly clear that if these petitioners had been granted separate trials,

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obtained copies through their interlocutory appeal. In *State* v. *Young*, *supra*, footnote 25, the Supreme Court of New Jersey sets forth a new procedure which appears to have been intended to obviate this problem in the future.

[25] At the close of the State's case each of defense counsel made a motion for judgment of acquittal, urging as grounds therefor the prejudicial effect of these confessions. [NJ/JA 606a-610a] Perhaps the remedy sought was too extreme; at any rate, it is suggested that at this point the trial judge should have granted the severance.

Godfrey's coerced statements, as well as the other cross-implicating statements, could not have been placed before the jury. To permit petitioners' constitutional rights to be undermined simply because it appeared to the trial court that it would be cheaper and easier for the state to try all of these defendants together, would be a shocking denial of justice.

V.

The Prosecutor's Inflammatory Summation So Grievously Misstated and Distorted the Facts, to the Serious Prejudice of the Defendants, That They Were Deprived of the Fair Trial Guaranteed by Due Process of Law.

The crucial issue at petitioners' joint trial, as handled by defense counsel, was whether the jury would bring in a verdict of death or life imprisonment. In that context, the prosecutor's summation was directed toward inducing the jury to vote a death verdict. His argument, both in style and content, so far over-reached permissible advocacy that it deprived petitioners of a fair trial as guaranteed by the Fourteenth Amendment.

The prosecutor carefully tried to create the false image in the minds of the jury that the defendants were professional criminals with extensive criminal records, who had lived profitable lives of crime and consistently followed standards of conduct abhorrent to the basic norms of decent society. In what he himself styled as the "parlance of the underworld" [T.R. 343], the prosecutor repeatedly used epithets implying petitioners' professional criminality and membership in that "underworld".

It is unnecessary to reproduce here all of the summation, in which the prosecutor repeatedly referred to the defen-

dants in various ways as "the slippery ring leader" [T.R. 343], the "finger man" or "the conniving finger man", [T.R. 242, 307] the "strongarm men" or the "strongarm guys" [T.R. 245, 307], and the "trigger man" [T.R. 243]. His favorite epithet was "hood" or "hoodlum" [T.R. 253, 311, 315, 317, 318.] Cassidy was referred to as "the lamb" [T.R. 307], or as "slick Cassidy". [T.R. 309] The weapons were described as "the arsenal" [T.R. 244, 309]. The climax of this litany of labels of professional criminality was the prosecutor's description of the defendants' appearance in the courtroom.

> "I did notice that each one of them changed a suit each day. Well, maybe they are fashion models, maybe they are the slick boys, big-time stuff, maybe they are; maybe they can dress in Ivy League suits, fancy shirts, high-priced ties, look the smart boy, visit the night clubs, drink, know the records, maybe they are. On whose money? On the Edward Davises' money ... Do you know why they can take this attitude? They can sit here because they have trained themselves to have an indifference to law and decency. They don't believe, they don't subscribe to our way of living, and if you ladies and gentlemen of the jury, if you decent, respectable people put your stamp of approval on it, if you condone these killings, if you condone these armed robberies to enable these boys to lead the slick lives that they do, if you condone it by recommending prison terms, may the Lord above help all of us." [T.R. 312-313]

Contrary to the prosecutor's inflammatory argument, there was nothing in the record to show that the defendants

were professional gangsters, living fashionably and in high style on the ill-gotten gains of robbery and murder. Cassidy had no criminal record of any kind, not even of arrest. Johnson and Godfrey each had one prior conviction. The image calculatingly drawn by the prosecutor bears no resemblance to the true situation."

In his recapitulation of the homicide for which defendants were being tried, the prosecutor argued, without any basis in the record, that the killing was pre-planned. [T.R. 244-245] Later, the prosecutor declared that the victim, Davis, frustrated their plans by not dropping dead immediately. [T.R. 249]

Defense counsel interrupted this virulent summation, but the trial court refused to intervene and permitted it to continue unabated. [T.R. 312]

The prejudicial and false implication of professional criminality of the prosecutor's summation was beyond the power of the defense to correct or overcome. Under the law prevailing at the time of petitioners' trial, evidence

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" The opinion of this Court in *Viereck* v. *United States*, 318 U.S. 236, 248 (1943), is particularly appropriate: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States*, 295 U.S. 78, 88. Compare *New York Central R. Co.* v. *Johnson*, 279 U.S. 310, 316-18." This is no less applicable to a state prosecuting attorney.

germane only to the question of sentence was inadmissible. The defendants were powerless to convey to the jury, in any proper fashion, that they were not the slick professionals of the prosecutor's invention. Although the State Supreme Court has subsequently modified the rigor of its rule so as to permit evidence in mitigation or extenuation of punishment to be introduced in a capital case, *State* v. *Mount*, 30 N.J. 195, 152 A.2d 343 (1960), that Court has refused to make that change applicable to petitioners' case, which was tried before the *Mount* decision. See note 15, *supra*.

The New Jersey statute investing the jury in a first degree murder case with the responsibility to choose between a sentence of death and life imprisonment gives the jury no standards whatsoever to guide them, but does provide that the decision shall be made upon "the evidence." *N.J. Stat. Ann.* 2A:113-4. The prosecutor's pejorative summation was calculated to induce the jury to decide upon "facts" not in the evidence. The result effectively deprived petitioners of their right to a fair trial, guaranteed by the Due Process Clause of the Constitution.[30]

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[30] The Court below refused to treat the merits of this argument, on the ground that it had considered the summation on direct appeal from the conviction. [T.R. 364] The Court overlooked completely that the issue had not previously been raised in terms of the Constitution. Further, the prior determination rested substantially upon the failure of defense counsel to be more vigorous in their objections. This failure of counsel should not preclude a determination of the constitutional question on the merits. *Fay* v. *Noia*, 372 U.S. 391 (1963); *Henry* v. *Mississippi*, 379 U.S. 443 (1965).

VI.

The Prosecutor, Acting to Induce the Jury to Sentence Petitioners to Death, Argued Extensively That Petitioners Should Be Executed in Order to Deter Others From Engaging in Crime, an Unfounded Theory Not Based on Any Evidence, Tending Thereby to Deprive Petitioners of Their Lives Without Due Process of Law.

As a matter of fundamental fairness and observance of sound legal principle, the wholly unfounded theory that the death penalty deters crime should not be urged upon a jury charged with the responsibility of choosing between a death sentence or life imprisonment. Neither in the charge to the jury nor in summation by counsel should the unproved belief that the death penalty has a special deterrent effect be permitted. In petitioners' trial, the prosecutor argued extensively that it was urgent for the jury to bring in a death verdict, rather than life imprisonment, because of the need for deterrence of others. Such argument deprived petitioners of due process of law.

The prosecutor openly declared that the theory of the death penalty was deterrence.

> "Ladies and gentlemen, punishment for crime is not all together retribution. The State does not say, because one life was taken, therefore another life must be taken. No, we don't come in on that basis. There are two reasons for punishment. You may have heard this time and time again, but let us get it clear here, because you are now concerned with it. There are two reasons for punishment, the first, punishment to the offender of the law and the second, a deterrent against others from breaking the law. This is your opportu-

nity, ladies and gentlemen, to flash a warning light to all of the hoodlums in and about Camden County and the State of New Jersey and to anyone else who dares to repeat this similar offense, that we will not tolerate it. We do not like this kind of business in our community or anywhere else. This is your opportunity, ladies and gentlemen, to shout out in a call that will be heard unmistakeably all around that death awaits the criminal who kills in the course of crime. This is your opportunity, ladies and gentlemen, to say that we decent people stand for law and order. Is this important? Edward Davis had a right to earn a livelihood in his toy store. Would anyone deny him that right? He had a right to expect that he would never be molested by anyone. He had a right to live and I respectfully urge you that this is your opportunity to announce by your verdict that the remaining Edward Davises in Camden County can continue to expect those rights . . . "[21] [T.R. 316-317]

More colorful than the prosecutor's lecture to the jury on his theories of penology were his allusions to the imagined effect on society if the death penalty were not imposed on petitioners.

"We will be returning the law of the jungle, talking about the law that they want, we shall be returning the law that the man who is the quickest on the draw, he will be the kingpin. I suppose the man who has the

[21] "Why should you compromise yourselves, the whole community's future and welfare for these three despicable criminals? Tell them and through them to everyone else who even has an idea to venture in this criminal business that crime does not pay." [T.R. 318]

most notches in his gun, he will be the fellow who will be respected in the neighborhood." [T.R. 313]

As is well known, there is no scientific evidence proving that the death penalty has any special deterrent effect. Most scholars who have compared jurisdictions with and without the death penalty have concluded that no perceptible deterrence is attributable to that penalty. See, e.g., *Bedau, The Death Penalty in America, Anthology, 1964,* especially *Chapter 6* thereof; *Thorsten Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute. XII, The American Law Institute, 1959; Capital Punishment, Staff Research Report No. 46, Ohio Legislative Service Commission, January 1961; Royal Commission on Capital Punishment, 1949-1953, Report, Her Majesty's Stationery Office, 1953; The Commonwealth of Massachusetts, Report and Recommendations of the Special Commission Established for the Purpose of Investigating and Studying the Abolition of the Death Penalty in Capital Cases, 1959; General Assembly of Pennsylvania, Report of the Joint Legislative Committee on Capital Punishment, June 1961.* For the prosecutor to tell the jury that the death penalty is justified as a deterrence of others, a deterrence not found in sentences of life imprisonment, was to mislead the jury on an issue that was critical to the verdict.

The California Supreme Court has firmly rejected the practice of prosecutors urging juries to return death verdicts on the basis of supposed deterrence. In the leading case, decided *en banc* in 1961, that Court declared:

"... it is not a matter of common knowledge, that capital punishment is or is not a more effective deterrent

than imprisonment. Since evidence on the question is inadmissible, argument thereon by prosecution or defense could serve no useful purpose, is apt to be misleading, and is therefore improper." *People* v. *Love*, 56 Cal.2d 720, 731, 366 P.2d 33, 39 (1961).

The California Supreme Court reaffirmed its conclusion and made the prohibition absolute two years later. *People* v. *Ketchel*, 59 Cal.2d 503, 381 P.2d 394 (1963).

This Court had made clear its position of the constitutional requirement that a jury's verdict must arise from the evidence presented at trial.

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner* v. *Louisiana*, 379 U.S. 466, 472-473 (1965).

New Jersey law also unequivocally requires that juries in capital cases, when fixing punishment, shall decide upon all the "evidence." *N.J. Stat. Ann.* 2A:113-4.

The prosecutor's argument in this case raised a factual question on which there was no evidence whatsoever. He implicitly asked, indeed he begged, for a verdict based on his supposed superior knowledge of crime and his official State position. Even if we consider him as testifying to his knowledge of the deterrent effect of the death penalty, the defendants were deprived of any chance to challenge his credentials as an expert or to cross-examine him. See *Pointer* v. *Texas*, 380 U.S. 400 (1965).

The undoubted prejudice to the defendants from the improper summation violates petitioners' constitutional rights, under the Fifth and Fourteenth Amendments, that their lives not become forfeited without a trial and verdict that meet the standards of due process of law.[32]

VII.

Statements Elicited From a Suspect in a State Criminal Proceeding During a Substantial Period of Unconstitutional Police Detention, Such That the Statements Are the Product of the Unlawful Detention, May Not Be Introduced by the Prosecution in a Later Trial of That Suspect.

The most celebrated writ in the history of Anglo-American law, the Great Writ of Freedom, *habeas corpus*, was designed to protect the liberty of the private citizen against arbitrary and illegal detention without due process of law. "In countries where the English common law prevails, and to some extent in other lands, it is the chief method of securing a peremptory determination whether a person is lawfully detained in custody, and if not, of providing for his immediate liberation. . . . [I]n the Stuart period, during the struggle to limit the royal prerogative, John Selden and other counsel sought to employ the writ as a method of restoring the liberty of a man imprisoned by the executive without showing the cause of the commitment. This . . . use of the writ, denied at first by the judges in *Darnel's Case*, 3 S.T. 1 (1627), was declared valid by the Petition of Right." Wyzanski, *The Writ of Habeas Corpus*, 243 THE ANNALS 101 (1946).

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[32] The New Jersey Supreme Court did not explicitly discuss this ground for relief. Since it had never been presented before the present post-conviction relief proceeding, it may be assumed that the court below implicitly rejected the argument on the merits.

The guarantee that no person shall be deprived of liberty or imprisoned by the executive without a showing of cause for the commitment is written into the Constitution in the Fifth and Fourteenth Amendments. Detention of individuals by the police, at their will and whim, is plainly anathema to one of our most cherished principles.

In the case of petitioner Cassidy, there was an incontrovertibly unconstitutional deprivation of liberty without due process of law. Arrested in the pre-dawn hours of January 29, 1958, he was held *incommunicado* at the complete mercy of the police and prosecuting authorities of Camden until, more than two days later, he was first taken before a judicial officer and afforded a court hearing on the propriety of his commitment.

No one could properly describe such detention as lawful. The clearest indication of the lawlessness of what occurred is seen in the inevitable result of a petition for writ of *habeas corpus* that hypothetically might have been filed on behalf of Cassidy prior to January 31. Against a rule to show cause why Cassidy should not be discharged from custody, the State would have had no response. Under our Constitution, under one of our most fundamental principles, the police have no right to hold any man who seeks *habeas corpus* relief if a judicial order has not been made for his commitment. No State can answer a *habeas corpus* court with the response that the police and the prosecutor think they have the right to deprive a man of liberty.

Of course, Cassidy did not in fact petition for a writ of *habeas corpus*. His jailers were determined that he see no judicial officer until they had extracted from him confessions that they believed would assure his conviction of murder in the first degree. Despite an unequivocal New Jersey

Rule, N.J.R.R. 3:2-3(a), requiring the police to take persons they arrest before a magistrate without unnecessary delay, Cassidy's inquisitors wanted no judicial interference with their quest to wring a life-forfeiting confession out of him. Therefore, Cassidy himself was powerless to petition for the Great Writ of Freedom.[33] Nor was he able to communicate with anyone else who conceivably might have acted on his behalf. The police were not forced in fact to answer to a court their lawlessness. But it is beyond argument that their acts were utterly without process of law.

As a result of the prolonged, unlawful, secret detention, the police and prosecuting authorities elicited from Cassidy three formally recorded statements that were used in his trial to condemn him to death. Those statements were unquestionably the product of the unconstitutional deprivation of liberty. As such, those statements should not have been permitted to be introduced as evidence. See *Watts* v. *Indiana*, 338 U.S. 49, 56, 57 (1949) (concurring opinion of Mr. Justice Douglas).

The products in the form of tangible evidence derived from an unreasonable search and seizure must, under the Constitution, be excluded from evidence. *Weeks* v. *United States*, 232 U.S. 383 (1914); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Not only tangible evidence, but statements made by a defendant in his own home at the time of an unlawful arrest are the fruits of the unlawful action and must be excluded from evidence.[34] *Wong Sun* v. *United States*, 371

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[33] Doubtless he was ignorant of his right to due process of law, but his jailers did not advise him that he was entitled to petition for *habeas corpus*.

[34] See also *People* v. *Schaumloffel*, 53 Cal. 2d 96, 346 P.2d 393 (1959); *People* v. *Mills*, 148 Cal. App. 2d 392, 306 P.2d 1005 (1957); *People* v. *Albea*, 2 Ill. 2d 317, 118 N.E.2d 277 (1954);

U.S. 471 (1963).[35] *A fortiori* statements wrung from a criminal suspect held unconstitutionally for a prolonged period must be excluded from evidence.

The basis for exclusion of tangible evidence that is the fruit of an unreasonable search and seizure does not touch the probative reliability of the evidence. See *Linkletter* v. *Walker*, 381 U.S. 618 (1965). However, statements that are elicited during a lengthy period of secret detention and intensive interrogation inevitably raise doubts as to their reliability. And, indeed, Cassidy asserts that those statements extracted from him are bent by the pressure of police interrogation to admit a planned robbery that did not exist. In light of the substantial possibility that statements taken under these circumstances are not fully credible, no problem of retroactivity of the exclusionary principle is present. See Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 84-86 (1965).[36]

People v. *Martin*, 383 Ill. 192, 46 N.E.2d 997 (1943). In each of these cases the identity of potential prosecution witnesses was ascertained through an unlawful search, and the witnesses were not allowed to testify at the subsequent trial.

[35] That this decision rests on a constitutional footing is revealed by *Traub* v. *Connecticut*, 374 U.S. 493 (1963), which reversed a State decision *per curiam* on the basis of *Wong Sun*.

[36] Professor Mishkin's analysis is directed not to the issue of retroactivity of new developments in constitutional law, which he believes should always be deemed fully retroactive, but rather to the scope of federal *habeas corpus* relief as a form of collateral attack on judgments that have become final. The present case arises under a state post-conviction remedy. Under Professor Mishkin's analysis, since the New Jersey Supreme Court purported to treat this contention on the merits, rather than on the scope of the State remedy, this Court should likewise reach the merits without regard to concerns of retroactivity. See Mishkin, *Foreword*, 79 HARV. L. REV. 56, 91 n.132 (1965).

The New Jersey Supreme Court failed to recognize the force of petitioner's argument because it mis-characterized the argument as deriving from the New Jersey rule requiring that persons who have been arrested be taken before a magistrate without unnecessary delay. N.J.R.R. 3:2-3(a). [T.R. 361] That court inferred, incorrectly, that petitioner was making an argument under State law analogous to the exclusionary rule this Court has laid down with respect to Rule 5 of the Federal Rules of Criminal Procedure. *Mallory* v. *United States,* 354 U.S. 449 (1957); *McNabb* v. *United States,* 318 U.S. 332 (1943). This is a misconception of the contention advanced. Petitioner's argument is based entirely on the Constitution and has nothing to do with N.J.R.R. 3:2-3(a).[37] Cassidy's detention was not unconstitutional because New Jersey has adopted a rule of court requiring the production of arrested persons before magistrates. If the New Jersey court were to repeal N.J.R.R. 3:2-3(a) formally, as it has done already in effect by giving the rule no force whatsoever, deprivation of liberty at the will and whim of the police would still be unconstitutional.

The prolonged detention of Cassidy by the police without a judicial commitment was a violation of the Fifth and Fourteenth Amendments of the Constitution. His three formally recorded statements were a product of that illegal detention. The introduction of those statements into evidence on behalf of the prosecution vitiates his conviction, and he is entitled to relief.

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[37] Likewise, petitioner's contention is not based upon this Court's decisions in *Mallory* v. *United States, supra* and *McNabb* v. *United States, supra,* which explicitly rest on this Court's supervisory power over federal courts, a power inapplicable to the States.

CONCLUSION

For all of the reasons set out above, it is respectfully submitted that the judgment of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

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No. 762

Vide Nos. 584,759,760 for Brief of National District Attorneys Association.

Vide Nos. 584,759,760,761 for Brief of American Civil Liberties Union

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IN THE

Supreme Court of the United States

October Term, 1965.

No. 762.

SYLVESTER JOHNSON and STANLEY CASSIDY,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Brief for Respondent

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COUNTER-STATEMENT OF FACTS.

Shortly after 6:00 P. M. on the evening of Friday, January 24, 1958, Edward J. Davis, who owned and operated a toy shop at 1731 Broadway (next door to the northwest corner of Broadway and Ferry Avenue, Camden, New Jersey (NJ/JA 43a-44a), came running out of his store calling for help (NJ/JA 44a). He was heard to shout, "Help! I am shot" (NJ/JA 54a). He was bleeding profusely (NJ/JA 56a-57a). He collapsed to the sidewalk from the arms of one of his neighbors who rushed to his aid (NJ/JA 24a-32a). The police were notified and within a few minutes thereafter, a police patrol car ambulance rushed Davis to the hospital (NJ/JA 75a). Approximately thirty-five minutes after entering the hospital, Davis died (NJ/JA 98a).[1]

Subsequent examination revealed the presence of seven gunshot wounds on Davis' body (NJ/JA 112a). The medical examiners concluded that Davis had been shot four times (NJ/JA 112a-116a). There were no powder burns on the body (NJ/JA 119a). One bullet entered the right side of the nose, another in the right cheek bone and a third in the neck at the left of the Adams apple (NJ/JA 116a-117a), with the fourth entering through the left groin.

Death resulted from hemorrhage due to the perforating wound of the liver and right lung which, in turn, was caused by the bullet which entered the body through the left groin and passed upward through his small bowel, liver, lung and posterior wall of his chest (NJ/JA 117a-118a).

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[1] Citations to the portions of the Joint Appendix supplied to this Court and printed in the Transcript of Record will be prefixed "T. R." Citations to the entire record of the trial printed as a joint appendix which was filed with this Court as appendix C of the Petition for Certiorari filed in October Term, 1960, No. 1133 Misc. will be prefixed "NJ/JA."

At the time he was admitted to the hospital he had $294.24 in cash on his person (NJ/JA 95a).

The first leading clue to the solution of the murder came from a witness who, while waiting for a red traffic signal at the corner of Fourth Street and Ferry Avenue, observed the automobile belonging to defendant, Wayne Godfrey, going through the red light and turning into Ferry Avenue. He noted the license number and general description of the vehicle. He also noted that the vehicle stopped on Ferry Avenue between Fourth and Third Streets and started up again (NJ/JA 185a-186a). When this motorist learned of Davis' death, he remembered the motor vehicle violation occurred at about the same time as the homicide (NJ/JA 189a). He thereupon notified the police of the license number and learned that the car was registered in the name of Wayne Godfrey.

The State proved that several days before the murder, Cassidy called at Brimm's house and obtained from him his .25 calibre automatic, under the pretense of holding it for him. Cassidy returned the gun to Brimm on Friday, January 24th, about 7:00 or 8:00 P.M. (NJ/JA 249a-252a); on the night preceding the attempted robbery of Davis, Godfrey called at his friend, Walker's home, and borrowed Walker's loaded .32 calibre revolver. It later turned out to be the murder weapon (NJ/JA 227a-241a-264a-268a). Godfrey returned the murder weapon to Walker on Friday night after the shooting (NJ/JA 229a-231a).

Noah Hamilton testified that six or eight weeks before the fatal shooting he had a conversation with defendant, Godfrey, at which time, Godfrey asked him if he wanted to make some money and suggested a hold-up of a toy store at Broadway and Ferry Avenue (NJ/JA 287a-289a). Hamilton further stated that he met Godfrey about 9:00 or 10:00 o'clock in the evening of Friday, January 24th, at a taproom. He stayed with Godfrey at the taproom till about midnight

when they drove off to meet Godfrey's wife (NJ/JA 269a-271a). While waiting for Godfrey's wife to appear, Godfrey asked Hamilton to buy a newspaper and look for a hold-up and shooting at Broadway and Ferry Avenue. When Hamilton told Godfrey about the newspaper account of a hold-up and shooting at Broadway and Ferry Avenue, Godfrey said, "That was it" (NJ/JA 273a-275a).

The three defendants with the two previously secured guns, arranged to rob the victim, and pursuant to their plan, Godfrey drove his car to Cassidy's home. There he picked up Cassidy and Johnson and drove them to Broadway and Ferry Avenue. He parked his car around the corner. Godfrey waited in the get-away car; Johnson and Cassidy, both armed with the guns, entered the Davis toy store and pretended to be shoppers. While there, Johnson fingered a toy truck. After surveying the premises, they both left and returned to the Godfrey car. The three of them discussed the matter between themselves. Cassidy and Johnson decided to return to the store and go through with their plan to rob Davis and take the toy truck with them that Johnson already realized carried his fingerprints.

Still armed with the previously secured guns, Cassidy, with the gun that he obtained from Brimm, and Johnson, with the revolver that was obtained for him by Godfrey, returned to the Davis store. Cassidy attempted to attract Davis to the rear of the store. Davis followed him. Johnson was in back of Davis. When they reached about the center of the store, Johnson, with his loaded gun drawn, announced to Davis, "This is a stick-up." Davis resisted. He made some effort to rebuff Johnson. In turn, Johnson started to fire his gun and shot Davis four times. Davis, mortally wounded, staggered out through the front of his store to the sidewalk. Cassidy and Johnson escaped through the rear door, they pulled off its hinges—it had been nailed tight. Cassidy ran back to the car where Godfrey was wait-

ing. Johnson ran down Ferry Avenue where he was picked up by Godfrey a few minutes later, about a block and a half away. Godfrey dropped Johnson off near his home and Cassidy near his.

The following day, Johnson, accompanied by Cassidy and Godfrey, took flight to Newark. Noah Hamilton accompanied them. Godfrey, Cassidy and Hamilton returned to Camden later that night. Johnson remained in Newark until he was apprehended by the police.

The police took Godfrey into custody on Tuesday afternoon, January 28, 1958 (NJ/JA 197a), at 4:00 A.M., the following morning, January 29th, Cassidy was arrested (NJ/JA 201a) and Johnson was apprehended in Newark late in the afternoon of the same day (NJ/JA 204a).

All three of the defendants confessed to their participation in the attempted robbery and the murder (Cassidy, NJ/JA 458a-480a-485a-489a-492a-495a; Godfrey, NJ/JA 508a-539a, 542a-547a; Johnson, NJ/JA 555a-581a).

At the trial of the defendants, the trial court heard testimony on the questions of the admissibility of the defendants' confessions out of the presence of the jury (T. R. 85a-206a). In the case of Stanley Cassidy, Chief of Detectives, Dube, testified that prior to taking the defendants' statement, Cassidy was warned of his rights and informed of the nature of the crime under investigation. Chief Dube stated to the defendant, Cassidy:

> "I am going to ask you some questions as to what you know about the hold-up, but before I ask you these questions, it is my duty to warn you that everything that you tell me must be of your own free will, must be the truth, and without any promises or threats made to you, and knowing anything you tell me can be used against you, or any other person, at some future time" NJ/JA-459a).

Chief Dube further testified that there were nc threats, promises, acts of violence or intimidation (T. R. 115a).

At the conclusion of Chief Dube's testimony, the defendant, Cassidy, through his attorney, stated: "Defendant Cassidy does not admit but does agree with all answers given by Chief Dube" (T. R. 115a). The testimony of Chief Dube was further substantiated by Sergeant Conley of the Camden Police Department (T. R. 120a-121a), Captain Philip Large of the Prosecutor's Office and Mr. Fred Albert, the official court stenographer[2] (T. R. 126a), all of whom stated that no threats, promises, physical violence or assault was used.

After the State presented all of its evidence to prove the voluntariness of Cassidy's confession, the court asked of the defendant's, Cassidy, attorney: "Does the defendant, Cassidy, have any testimony or evidence that he desires to offer as to the voluntary nature of his confession or confessions?" (T. R. 138a). The defendant's attorney responded: "No, your honor" (T. R. 138a). Again the court asked, "No evidence on his behalf in this respect?" (T. R. 138a). The defendant's attorney stated, "That is correct" (T. R. 138a).

Cassidy's attorney argued in his summation, "Our Prosecutor cannot say that Stanley Cassidy lied. Whatever is in this statement made by Stanley Cassidy is true. I know it

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[2] Mr. Albert, official court stenographer, who recorded the confession, stenographically, testified that before the confession was given, Chief Dube made the following statement to Cassidy:

"I am going to ask you some questions as to what you know about the hold-up, but before I ask you these questions it is my duty to warn you that everything you tell me must be of your own free will, must be the truth, without any promises or threats having been made to you, and knowing anything you tell me can be used against you, or any other person, at some future time. Do you understand what I have just said to you, Stanley?

A. Yes, I understand.

Q. Under those circumstances are you willing to answer my questions?

A. Yes." (NJ/JA 459a-14 to 25.)

is true. Of course, again, my opinions are not binding upon you and my reason for knowing it is true is because of the meetings and consultations I have had with Stanley. We have been over this many, many times" (T. R. 270a). At the request of the defendant, Cassidy, the testimony concerning the voluntariness of his confession was not heard again before the jury (T. R. 205a).

As with Cassidy, the question of the voluntariness of the defendant's, Johnson, confession was first examined by the court outside the presence of the jury. Chief Dube stated that the defendant, Johnson, was informed of the nature of the crime under investigation and that Johnson was warned as follows:

> "I told him I wanted to ask him some questions as to what he knew of the hold-up and shooting, but before I did ask him these questions, it was my duty to warn him that everything he told me must be truthful, and of his own free will, without any threats or promises having been made to him, and knowing that everything he told me could be used against he or any other person at some future time" (T. R. 184a).

Chief Dube further stated that no promises were made to the defendant and that the defendant was not physically abused or intimidated. The testimony of Chief Dube was substantiated by Detective William Neale (T. R. 191a), Sergeant Conley of the Camden Police Department (T. R. 193a), Detective William Large of the Prosecutor's Office (T. R. 197a), and Mr. Fred Albert, the official court stenographer (T. R. 203a), all of whom stated that no threats, promises, intimidation, physical violence or assault were used.[3]

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[3] Mr. Albert, official court stenographer, who recorded the confession, stenographically, testified that before the confession was given, Chief Dube made the following statement to Johnson:

> ". . . before I ask these questions it is my duty to warn you that everything you tell me must be the truth, must be of your own

The attorney for the defendant, Johnson, presented no evidence on the question of the voluntariness of the confession (T. R. 204a). In his summation, Johnson's attorney alleged that the statement given to Chief Dube was true. He stated, "That statement of Johnson was truthful and honest, because when that was finished, that was the end of it" (T. R. 293a). He further stated, "There were no threats, there was no attempt to evade, there was no trickery" (T. R. 295a).

Both defendants were found guilty of murder without a recommendation of life imprisonment. The death sentence followed automatically.[4] The convictions were confirmed on appeal by the New Jersey Supreme Court (31 N. J. 489, 158 A. 2d 11 (1960)). On the appeal, no assertion was made that the confessions of Johnson and Cassidy were involuntary.

On motion for a new trial, Johnson and Cassidy alleged for the first time that their confessions were involuntary. Testimony was heard by the trial court and the relief sought was denied, 63 N. J. Super. 16, 163 A. 2d 593 (1960). On review, the New Jersey Supreme Court, after a full examination of the record, concluded the evidence proffered by Johnson and Cassidy was untrue, and the trial court's de-

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free will, without any threats or promises having been made to you, and knowing anything you tell me can be used against you, or any other person, at some future time. Do you understand what I have said to you?

A. Yes, sir.

Q. Under those circumstances are you willing to answer my questions?

A. Yes." (NJ/JA 555a-33 to 556a-10.)

[4] N. J. Statute R. S. 2A:113-4, provides:

"Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed."

cision was affirmed, 34 N. J. 212, 168 A. 2d 1 (1961). This court refused certiorari, 368 U. S. 933, 7 L. Ed. 2d 195 (1961).

After the denial of the motion for a new trial, the defendants filed a habeas corpus action in the Federal Court where the question of the voluntariness of their confessions was again reviewed on the merits and relief denied.[5] *U. S. ex rel. Johnson v. Yeager*, 327 F. 2d 311 (3rd Cir. 1964); certiorari denied, 377 U. S. 984, 12 L. Ed. 2d 751 (1964); *U. S. ex rel. Johnson v. Yeager*, 327 F. 2d 320 (3rd Cir. 1964).

Petitioners are now before this Court on review of an application for post-conviction relief. The New Jersey trial court refused the defendants' request for a new evidentiary hearing. On appeal to the New Jersey Supreme Court, defendants, for the first time, some six years after their trial, submitted affidavits alleging a denial of a request for counsel during the police interrogation. The New Jersey Supreme Court considered the affidavits as if they were previously offered for the trial court's consideration. *State v. Johnson*, 43 N. J. 572 at 578, 206 A. 2d 737 (1965). The original petition for post-conviction relief was not supported by any affidavits (T. R. 12a). The petition was silent as to the State's denial of the request for counsel. Indeed attorney for petitioners, at oral argument, on the petition conceded the petition omitted this fact (T. R. 26a-27a).

The New Jersey Supreme Court refused to rehear the issue of voluntariness as that issue had been fully litigated and decided against the defendants on a prior motion for new trial (T. R. 346a-347a). The Court held that, apart from the issue of voluntariness, the alleged denial of an opportunity to consult with counsel where the issue was raised on collateral attack. Ibid., 43 N. J. 572 (1965).

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[5] U. S. District refused habeas corpus in unreported Opinion.

SUMMARY OF ARGUMENT.

The question of the voluntariness of the defendants' confessions, having been fully considered by the New Jersey courts on a motion prior to the present application, should not be reconsidered at this time. The petitioners were represented by counsel at the original trial where they had the right to try the issue of voluntariness, but declined to do so. An appeal was taken from the trial to the New Jersey Supreme Court, and the defendants again failed to raise the issue. The New Jersey Supreme Court later permitted a motion for a new trial at which testimony was heard on the trial level on the question of voluntariness at which time the trial judge, after considering petitioners' testimony, declared they had "conjured up a theory which lacks all basis in fact." *State v. Johnson*, 63 N. J. Super. 16, 38, 163 A. 2d 593 (Law. Div. 1960). The testimony was reviewed by the New Jersey Supreme Court and the confessions were found to be voluntary. The denial of a request for counsel or a failure to warn the accused of his rights were factors to be considered on the question of voluntariness, but were never raised.

The petitioners were represented by counsel at every stage of the trial, the appeal from the trial, the motion for a new trial, and the appeal from that motion. The petitioners, in their present application for post-conviction relief, asked the New Jersey Supreme Court, on appeal from the trial court, to consider the voluntariness of their confessions afresh. The petitioners were not handicapped by lack of counsel, or lack of a transcript in presenting their past attack on the voluntariness of their confessions. There was no justification for the New Jersey courts to hear over and over again an issue which had been finally determined.

The first time the allegation was made that the petitioners were denied their request to consult with counsel, before confessing, was by way of affidavit seeking post-conviction relief from the New Jersey Supreme Court. The affidavits were not accepted by the court as relevant to the question of voluntariness as that question had been decided by a prior proceeding. The evidence of the psychological background of the defendants has never been presented to any New Jersey court and never proven in any court, and should not be entertained by this court on review of the State court proceedings.

By the simple expedient of attaching affidavits to their Appellate briefs, petitioners have sought to introduce as "unrefuted," the right to consult with an attorney of their choice. The State emphatically and unequivocally denies these false assertions. Although these affidavits were made while petitioners were in the death house awaiting execution and although they indicate that petitioners were aware that false swearing is a misdemeanor, subject to punishment, the State of New Jersey insists on its right to challenge these "unrefuted" affidavits. An evidentiary hearing was never held to allow rebuttal testimony by the State, vis-a-vis these affidavits. Our New Jersey Supreme Court considered these affidavits, *arguendo*, and assumed that petitioners' allegations were within the principles announced by *Escobedo* (an assumption they considered unsound). The Court went on to dispose of this issue by refusing retroactive application of this issue (Ibid., 43 N. J. 572).

The interrogation of both of the petitioners by the police were within the constitutional boundaries outlined in *Escobedo v. Illinois*. Prior to asking any questions, the police warned the petitioners of the nature of the inquiry, that any answers must be of their own free will and that anything said could be used against them. By implication this warning includes the right to remain silent.

The holding of *Escobedo* should not be extended to require the State to offer and furnish counsel when not requested. Even if the alleged refusal to supply counsel for the accused during interrogation is a violation of the Constitutional right, such a rule should not be applied retroactively.

ARGUMENT.

Point I.

A.

The interrogation of petitioners was within the constitutional boundaries outlined in Escobedo v. Illinois.

Two theories exist for the exclusion of confessions from the trial of criminal cases. At common law a coerced confession was excluded because it might be false. Wigmore Evidence (3rd Ed. 1940), Vol. 3 Sec. 815. Such was the theory in *Brown v. Mississippi*, 297 U. S. 278 (1936), where the court was concerned with a fair trial. In another early confession case, Justice Roberts wrote:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it, we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt." *Lisenba v. California*, 314 U. S. 219, 236 (1941).

Under the second theory, a confession may be inadmissible without consideration for its probable falsity, if it is obtained through gross and abusive police methods.

As Justice Frankfurter stated:

> "In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken." *Watts v. Indiana*, 338 U. S. 49, 55 (1949).

In *Escobedo*, the court was obviously concerned with the technique used by the police to get a confession from the accused. The physical restraint of his attorney from consulting with him was designed to bar the accused from gaining knowledge of his constitutional rights. The conduct of the State official was reprehensible and merited censorship. Further, the court found, that considering the whole context of the interrogation, the resulting confession which was introduced at the trial of accused vitiated the conviction. Escobedo was a young immigrant with only scant knowledge of the English language, and with no exposure to the rudimentary constitutional principles with which every American has at least some familiarity through history, magazines, books and movies.

The heart of the matter was the problem of an accused making a self-incriminating statement to the police, where the accused was unaware of his constitutional right not to do so, and where the police actively prevented him from gaining knowledge of his rights. As the court stated it:

> "We have also learned the companion lesson of history that no system of criminal justice can, or should,

survive, if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." *Escobedo*, at page 490.

Conceding that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence and conceding that an accused will often make a confession because he is unaware of his constitutional right to remain silent, it does not follow that where there is a denial of a request by an accused that he be permitted to consult with counsel during interrogation, that a resulting confession is coerced or that it was made in ignorance of constitutional rights.

Police interrogation is not inherently evil and contrary to the principles of the Constitution of the United States, if counsel is not present during the questioning. As Dean Pound stated:

> "Immunity of accused persons from all interrogation, if they are firm, well-advised and able to give bail, is the most effective shield of wrongdoers." The Spirit of Common Law, page 104 (Beacon Press, 1963).

Of course, if counsel is present during interrogation, this court will never have to decide whether a confession was coerced or the accused had knowledge of his constitutional rights. Requirement of counsel at all interrogations is equivalent to an immunity from interrogation. In the words of Justice Jackson:

> "Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statements to police under any circumstance." *Watts v. Indiana*, 338 U. S. 49, 59.

Crooker[6] held, and *Escobedo* re-emphasized, that an accused may be informed of his constitutional rights by the authorities, id., 491, or he may be aware of them through education, id., 492. Neither *Crooker* nor *Escobedo* establishes an absolute rule that every state's denial of a request for counsel during interrogation is an infringement of a constitutional right without regard to the circumstances of the case.

In the instant case, both defendants were informed of their rights by the police authorities.

Before the interrogation, Chief Dube instructed Cassidy as follows:

> "I am going to ask you some question as to what you know about the holdup, but before I ask you these questions, it is my duty to warn you that everything you tell me must be of your own free will, must be the truth, and without any promises or threats made to you, and knowing anything you tell me can be used against you, or any other person, at some future time."[7]

Though the warning was not prefixed with any statement concerning the Constitution, the content fairly apprised the defendant of his rights. He was informed that the questioning would be directed at a hold-up, that any statement must be of the defendant's free will, and that anything the defendant said could be used against him.

Chief Dube, Sergeant Conley, Captain Large and Mr. Fred Albert, the official Court Stenographer, stated that no threats, promises, physical violence or assault was used in obtaining the statement from Cassidy.

The interrogation of Johnson was conducted in the same

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[6] **Crooker v. California**, 357 U. S. 433 (1958).

[7] See footnotes #1 and #2 for the record of Chief Dube's warning, which was made contemporaneously with the taking of the statement.

manner. Chief Dube stated that he warned Johnson as follows:

> "I told him I wanted to ask him some questions as to what he knew of the hold-up and shooting, but before I did ask him those questions, it was my duty to warn him that everything he told me must be truthful, and of his own free will, without any threats or promises having been made to him, and knowing that everything he told me could be used against he (sic) or any other person at some future time."

Chief Dube, Sergeant Conley, Detective Large and Mr. Fred Albert, the official Court Stenographer, all testified that no threats, promises, intimidation, physical violence or assault were used to obtain the statement from Johnson.[8]

Neither of these cases demonstrate gross or abusive police conduct, nor do we find in either interrogation the police taking advantage of the accused's ignorance of constitutional rights. The defendant was informed of his right not to speak unless of his own free will and of the danger that any statement which he might make could be used against him. Even if the alleged denial of counsel during interrogation is taken at face value, the defendants were adequately informed of their rights, and the denial of counsel should not vitiate their confessions.

The first time the defendants ever raised the alleged denial of requested counsel in the New Jersey courts was five years after their conviction, though the denial of counsel is a factor to be considered on the question of voluntariness in New Jersey. *State v. Johnson*, 43 N. J. 572, 206 A. 2d 737 (1965); *State v. Naglee*, 44 N. J. 209, 207 A. 2d 689 (1965); *State v. Puchalski*, 45 N. J. 97, 211 A. 2d 370 (1965).

The fact could have been raised during a hearing on the

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[8] See footnotes #1 and #2 for the record of Chief Dube's warning, which was made contemporaneously with the taking of the statement.

voluntariness of the confession during the initial trial back in 1959. The defendants never mentioned it, though the hearing was held out of the presence of the jury. The fact could have been raised again back in 1960 during a hearing for a new trial when the voluntariness of the defendants' confessions was again reviewed. The defendants never mentioned it. The first time any mention of a denial of counsel was made in the New Jersey court was on the present application for post-conviction relief.

The voluntariness of the defendants' confessions was reviewed in a prior action on the merits by the New Jersey Supreme Court in 1961. *State v. Johnson*, 34 N. J. 212, 168 A. 2d 1 (1961), cert. den. 368 U. S. 933 (1961).

In 1963 the United States Court of Appeals for the Third Circuit reviewed the question of the voluntariness of the defendants' confessions on the merits and again the defendants did not allege denial of counsel. (Relief was denied, 327 F. 2d 31 and 327 F. 2d 320 (1964).)

If this court should decide that counsel for the accused must be present at all police interrogation, it will be discarding completely what it has previously recognized as a value, interrogation of the accused as part of police investigatory procedure as little as one year before *Escobedo*, there was no question that the interrogation of an accused by the police was considered of value to society. *Haynes v. Washington*, 373 U. S. 503, 515 (1963).

The standard that has been applied over the years in determining whether the value of the constitutional right to remain silent outweighed the value to society of the police interrogation of an accused was one of voluntariness. To require that counsel be present during all police interrogation of an accused would, in effect, do away with the striking of this balance, for the lawyer in the American judicial system is concerned not with society's problems in solving

crimes; his duty is to protect his client, guilty or innocent. *Watts v. Indiana*, supra, 338 U. S. at 59.

The lawyer will not only instruct his client in his constitutional right, he will direct him in the manner in which the rights shall be exercised which, in effect, will mean there will be no police interrogation.

Under existing New Jersey law, the absence of counsel at police interrogation and the failure of the police to warn the defendant of his right to remain silent, is a fact to be taken into consideration in determining whether a confession should be admitted into evidence. *State v. Johnson*, supra, 43 N. J. 572, at 578. *State v. Puchalski*, supra; *State v. Naglee*, supra. The admissibility of the confession depends on the balance struck after weighing the competing values: the right to remain silent, the value to society of police interrogation, and the integrity of the judicial process. This is the test that was applied in *Crooker v. California*, 357 U. S. 433 (1958), and was the test that was applicable when the defendants in this case were tried in 1959.

A rule which would exclude all pretrial statements made in the absence of counsel, is unnecessary to prevent police coercion and the violation of an accused's right to remain silent. *Crooker* recognized this and *Escobedo* suggested it. The police can, as they did in this case, warn the accused that the statements must be made freely and that anything the accused might say can be used against him. The introduction of counsel at the interrogation would do nothing to prevent the accused from making a statement which he would otherwise be willing to make.

There can be no question that counsel would be of value to the accused during the interrogation. Counsel is of value at any time that an individual must deal with state officials, but the question remains is the individual's right to counsel during interrogation of higher value to society than the continuance of the police procedure of interrogating criminals?

It is submitted that the choice between interrogation and no interrogation, need not be made, whereas here, the defendant is warned in clear layman's language that his statement must be of his own free will and what he says may be used against him. He is adequately equipped to make a determination for himself whether he should speak or not.

Escobedo is not applicable to the facts in this case. In *Escobedo* the defendant had retained a lawyer and had requested the opportunity to talk with him, which was denied. In the instant case, neither defendant had retained a lawyer. In *Escobedo* the defendant's lawyer was not permitted to consult with his client. Here, neither defendant had retained a lawyer. In *Escobedo,* defendant was a foreigner, with little or no exposure to basic constitutional principles. Here, both defendants were native-born and exposed to the American educational system, literature, movies, T.V., radio and newspapers. In *Escobedo* the defendant received no warning from the police that his statement could be used against him. Here, both defendants were instructed that their statements must be of their free will and that their statements could be used against them.

There is no evidence here of the wholly evil practice of the use of the third degree, physical or psychological. The officials did not carry on any lawless practice; they conducted themselves within the guidelines established by this court.

B.

The principle of Escobedo v. Illinois should not be held to be retroactive.

Unlike *Gideon v. Wainwright,* 372 U. S. 335 (1963), where the defendant could not raise his constitutional rights at trial or an appeal to the State Courts because of his lack of

counsel to instruct him in the proper procedure; and unlike *Griffin v. Illinois*, 351 U. S. 12 (1956), where the defendant was not permitted to appeal from a conviction due to his lack of funds, in the instant cases, both petitioners were represented by counsel at all stages of their trials, and their subsequent appeals. At all the proceedings before the New Jersey and Federal courts, they were permitted free transcripts and whatever resources were required to have their cases thoroughly reviewed.

Where a criminal defendant has been denied the resources and instruction necessary for a full and proper review of his case, it is only fair to permit him to raise his constitutional issue by way of collateral attack. But where convictions were rendered, appeals exhausted, and certiorari denied, and where the issues which petitioners seek to raise by collateral attack were reviewed on direct appeal, the prior decision of the court should be final. See *United States v. Sobell*, 314 F. 2d 314 (2nd Cir. 1963), cert. den. 374 U. S. 857 (1963), where the court held that an overruling decision of this court should not be applied retroactively on a collateral attack via a habeas corpus petition so as to upset a previously valid judgment. The *Escobedo* decision is far removed from those cases where new constitutional principles were applied retroactively. Retroactivity of new constitutional rules were granted only in instances where the alleged violation of the defendants' rights deprived them of a fair opportunity to litigate the question of their guilt or innocence. Similarly the coerced confession cases were held retroactive because these confessions were potentially unreliable and could result in conviction of an innocent defendant. *Reck v. Pate*, 367 U. S. 433 (1961); *Fay v. Noia*, 372 U. S. 391 (1963). But here, the admissibility and reliability of Cassidy's and Johnson's confessions were not attacked at their trial. Indeed, both of their attorneys argued to the jury that the confessions were true

and that the jury should accept the facts stated therein in mitigation of the offenses. This is not a conviction based on a probable or even a possible false confession, and this Court is not faced with the problem of determining whether the procedure used by the police may have led to the conviction of an innocent man.

Linkletter v. Walker, 381 U. S. 618 (1964); *Angelet v. Fay*, 381 U. S. 654 (1965) and *Tehan v. Shott*, 34 U. S. L. Week 4095 (1965), clearly establish that not every violation of a constitutional right will support a collateral attack on a final judgment of conviction. In *Linkletter*, the court stated, after reviewing the history and theory of retroactivity, that while a case is on direct review a change in the law will be given effect, but on collateral attack there is no settled principle of retroactive invalidity. It depends "upon a consideration of 'particular relations . . . and particular conduct . . .; of rights claimed to have become vested, of status of prior determinations deemed to have finality'; and 'of public policy,' " Supra, at p. 627. The Court then stated:

> "Once the premise is accepted that we are neither required to apply nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Supra, at p. 629.

The Supreme Court of New Jersey considered the above factors in deciding that *Escobedo* should not be retroactively applied, when it declared:

> "Where the reliability of the guilt-determining process is seriously impugned, there is good reason for applying the new rule to a case already decided. It would offend our sense of justice to continue to incarcerate a convicted man where subsequent consider-

tions cast grave doubts upon the reliability of the determination of his guilt. But where the conviction was obtained as a result of a procedure not considered fundamentally unfair at that time and subsequent judicial decisions cast no substantial doubts upon the reliability of the determination already made, no compelling reason exists for disturbing a decision no longer subject to direct appeal.

" . . . Unlike Gideon, the rule of law which the defendants contend Escobedo announces does not raise substantial doubt as to the reliability of the determination of guilt. Therefore, we will not apply that rule to the prior convictions (here) . . ." *State v. Johnson*, 43 N. J. at 585, 587.

The same factors which prompted this Court to hold *Mapp* non-retroactive, in *Linkletter* and *Griffin v. California*, 380 U. S. 609 (1965), and *Tehan*, supra, are involved when dealing with the issue of the retroactivity of *Escobedo*. As with *Mapp* and *Griffin*, (1) the purpose of the *Escobedo* rule would not be served by its retroactive application, (2) the state courts justifiably relied on the pre-*Escobedo* "voluntariness" doctrine, (3) the *Escobedo* decision does not impugn the fairness of the trial, (4) the retroactive application of *Escobedo* would have a catastrophic effect on the administration of justice. *Tehan v. Shott*, supra, considered these criterion. To the extent that the above circumstances are present in both situations, *Linkletter* and *Tehan* must be considered authoritative, vis-a-vis, the retroactivity of *Escobedo*. Since the *Escobedo* decision does not cast doubt on the integrity of the fact finding process, our "deepest sentiments of justice" are not offended and therefore justice would not be served by giving it retroactive application.

Prior to *Escobedo*, the mere failure to advise a suspect of

his right to counsel and his right to remain silent would not of itself prohibit the use of any statement made by the accused. In *Cicenia v. Legay*, 357 U. S. 504 (1958), and *Crooker v. California*, 357 U. S. 433 (1958), confessions were held admissible though obtained after a requested opportunity to consult with counsel was denied. The language of *Escobedo* is directed more to the danger to society than to the danger of an unjust conviction. The court stated in *Escobedo:*

> "No system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." 378 U. S. 478, 490.

The purpose of *Escobedo* was to deter police interrogation of a suspect without counsel so as to prevent unwary self-incrimination. See *Walden v. Pate*, F. 2d , 34 U. S. L. Week 2065 (1965). The court was addressing itself to the problem of reforming a system. A retroactive application of the principles of *Escobedo* is unnecessary for purposes of reform, but it would place a tremendous strain on a presently overburdened criminal system and would seriously disrupt the administration of justice. This court recognized the possibility of this in *Linkletter*, when it declared:

> "Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hear-

ings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice."

Again, the States would be penalized for following a procedure which this court had never prohibited.

"Until Escobedo, it had never been seriously urged that the mere failure to advise a suspect of his right to remain silent and his right to counsel would of itself, absent other factors evidencing unfairness or coercion, invalidate the use of any statement made thereafter by the accused." *United States v. Cone* (2nd Cir. 1965), decided November 22, 1965.

Unquestionably, with the passage of many years, perhaps even decades, retroactive application of *Escobedo* would cause tremendous chaos. With the passage of time, court transcripts and other relevant and necessary records may no longer be available; memories become inaccurate and witnesses may no longer be available, all of which factors aid the multitudinous defendants. See *Tehan v. Shott*, supra at 4099; *Linkletter v. Walker*, supra, 637-638; *U. S. ex rel. Angelet v. Fay*, 381 U. S. 65 (1965); *U. S. v. Sobell*, 314 F. 2d 314, 325 (2nd Cir.), cert. den. 374 U. S. 857 (1963).

For the foregoing reasons, the purposes of the *Escobedo* decision would not be served by permitting final judgments of state courts to be reopened and collaterally attacked many years after their rendition.

Point II.

Recent pronouncements by this court refused to apply retrospectively the decision of Griffin v. California.

This court, in *Tehan v. Shott*, 34 U. S. Law Week 4095 (January 19, 1966), refused to allow *Griffin v. California* retrospective application. This opinion succinctly moots petitioners' present argument.

The State of New Jersey has been informed by petitioners' counsel that in view of the aforesaid opinion they have abandoned the presentation of this issue.

Point III.

The mere fact that Wayne Godfrey's confession was found to be involuntary by the Circuit Court of Appeals does not require a reversal of petitioners' case.

Although the Third Circuit Court of Appeals held the confession of Wayne Godfrey involuntary, it nevertheless found petitioners Johnson and Cassidy's confessions to be voluntary. *United States, ex rel. Johnson v. Yeager*, 327 F. 2d 316, 319 (3rd Cir. 1964). Petitioners now argue that Godfrey's confession inspired petitioners to confess, and since Godfrey's confession has been held to have been involuntary, petitioners' confessions are involuntary.

The bald assertions that Johnson's confession was induced by his knowledge that Godfrey and Cassidy had already confessed and had identified him as the killer, is an unwarranted factual assumption. Furthermore, the contention that Godfrey's oral admission and presence induced Cassidy to confess is not bottomed on fact. It is, at best, conjecture

of counsel. The affidavits of Cassidy and Johnson, assuming their veracity, in no way indicates Godfrey's confession induced petitioners' confessions.

This point was considered and disposed of adversely to these petitioners by the same court that voided the Godfrey confession, when it stated:

> "Finding only Godfrey's confession to have been involuntary on the record before us, we have considered whether the admission of that confession itself affected the constitutional rights of Cassidy and Johnson. The introduction of a coerced confession in evidence against one defendant is not in itself the imposition of constitutional wrong upon his co-defendant. Stein v. New York, supra, 346 U. S. 156 at 194-196, 73 S. Ct. 1077 at 1097-1098, 97 L. Ed. 1522; Malinski v. New York, supra, 324 U. S. 401, at 410-412, 65 S. Ct. 781, at 786, 89 L. Ed. 1029. The jury was instructed to consider each confession as evidence against its maker only. And here we have the additional consideration that substantially the same information was placed before the jury in the confessions of Cassidy and Johnson as in the confession of Godfrey. In these circumstances, we think it is not reasonable to believe that the jury would or, indeed, had any occasion to go beyond Cassidy's and Johnson's own confessions and use similar statements in Godfrey's confession against them." *United States, ex rel. Johnson v. Yeager*, 327 F. 2d 311, 318-19 (3rd Cir. 1964), cert. denied as to Johnson and Cassidy, 377 U. S. 984; cert. denied as to Godfrey, 377 U. S. 977 (1964).

The New Jersey Supreme Court came to the same conclusion for the same reason. *State v. Johnson*, 43 N. J. 594, 206 A. 2d 737, 748-749 (1965).

In *Malinski v. New York*, 324 U. S. 401 (1945), the court, in a similar case, stated:

> "The furtherest we have gone in a comparable case from a State Court is to vacate the judgment against the co-defendant who did not confess and remand the case to the State Court for further consideration. Thus, in Ashcraft v. Tennessee, 332 U. S. 143 (1944), we followed that procedure at the suggestion of the Attorney General of the State, where the judgment against the co-defendant who did not confess was sustained by the State Court on the assumption that the confession which we held to be coerced was properly admitted and that the conviction of the defendant who did confess was valid."

In the case, *sub judice,* neither the trial court nor the New Jersey Supreme Court based its finding of voluntariness of petitioners' confessions on the assumption that co-defendant Wayne Godfrey's confession was valid. Both petitioners independently made voluntary confessions acknowledging their own participation in the crime.

Assuming, arguendo, the truth of petitioners' affidavits; and assuming further, that Godfrey's statements, as used by the police, were a factor in causing Johnson and Cassidy to confess, nevertheless, we submit that the constitutional rights of Johnson and Cassidy were not violated. This is not a case where a petitioner's involuntary statement has led to other evidence which is introduced at trial against *him.* See, e.g. *Wong Sun v. United States,* 371 U. S. 471, 487-488, 83 S. Ct. 407; 9 L. Ed. 2d 441, 455 (1963); Cf. *Trilling v. United States,* 104 U. S. App. D. C. 159, 260 F. 2d 677, 694 (D. C. Cir. 1958); *Jackson v. United States,* 106 U. S. App. D. C. 396, 273 F. 2d 521 (D. C. Cir. 1959); *Fahy v. Connecticut,* 375 U. S. 85, 91 (1963) (cited by petitioners, falls within the above category of cases). Here, the alleged coercion which was held to force Godfrey's confession was in violation of *his* constitutional rights and precluded its

introduction of illegally seized evidence against one who was not the victim of the seizure, have consistently held that that person cannot assert the denial of another's rights. See *Wong Sun v. United States*, supra, 371 U. S., at p. 492, 83 S. Ct., at p. 419, 9 L. Ed. 2d at p. 458; *State v. Nobles*, 79 N. J. Super. 442 (App. Div. 1963). Cf. *Goldstein v. United States*, 316 U. S. 114, 62 S. Ct., 1000, 86 L. Ed. 1312 (1942).

Point IV.

No error was committed by the trial judge in refusing to grant a severance.

In New Jersey, the granting of a motion for a severance is discretionary with the trial court. R. R. 3:5-7. This Rule is declaratory of the long-settled practice in this state, *State v. Rios*, 17 N. J. 572, 112 A. 2d 247 (1955); *State v. Manney*, 26 N. J. 362, 140 A. 2d 70 (1958), and denial of such a motion will not be reversed in the absence of a clear showing of mistaken exercise of discretion. *State v. Rios*, supra; *State v. Hall*, 55 N. J. Super. 441, 151 A. 2d 1 (App. Div. 1959); *State v. Yedwab*, 43 N. J. Super. 367, 128 A. 2d 711 (App. Div. 1957); *State v. Rosenberg*, 37 N. J. Super. 195, 117 A. 2d 168 (App. Div. 1955). The ultimate inquiry for the trial judge in passing upon such motions is whether a jury is likely to be unable to comply with the court's limiting instruction, *State v. Tassiello*, 39 N. J. 282, 188 A. 2d 406 (1963), and a claim of prejudice grounded upon the prospect that some evidence will be admissible only as to one defendant, does not require a severance as a matter of right. *State v. Manney*, supra. Respectable authority indicates that a defendant's confession inculpating a co-defendant may be admitted in a joint trial solely against the declarant, under appropriate instructions. *Delli Paoli*

v. United States, 352 U. S. 232 (1957); *State v. Stanford*, 90 N. J. L. 724, 101 A. 53 (E. & A. 1917); *State v. Unger*, 93 N. J. L. 50, 53, 107 A. 270 (Sup. Ct. 1919), reversed on other grounds, 94 N. J. L. 495 (E. & A. 1920); *State v. Newman*, 95 N. J. L. 280, 281, 113 A. 225 (Sup. Ct. 1921); 4 Wigmore, Evidence (3rd Ed. 1940), Sec. 1076, pp. 116-117, and Sec. 1079 (1) (d), p. 134. See also Annotation: "Right to Severance where Co-defendant has Incriminated Himself," 54 A. L. R. 2d 830, 833 (1957).

The trial court's refusal to order a severance and the subsequent introduction of petitioners' confessions did not violate petitioners' constitutional rights. As pointed out by the New Jersey Supreme Court, *State v. Johson*, 31 N. J. 489, 506 (1960), all the petitioners confessed and all the confessions were also in substantial agreement. In their confessions, none of the petitioners attempted to place the onus of the crime on the other petitioners. They all agreed on who did the shooting and the only discrepancy was on the question as to whose mind it was that originated the idea of robbing Davis' toy store. This factually distinguishes *State v. Young*, 46 N. J. 152 (1965), wherein deletion of a confessing defendant's inculpatory statement against a non-confessing co-defendant were not permitted. Separate trials for each defendant would have meant the three-fold production and repetition of all the testimony of numerous doctors, law enforcement officers and other witnesses. On seven distinct occasions, during the trial and in his charge, the trial judge gave specific cautionary instructions to the jury on the limited effect to be given the confessions. On this basis our New Jersey Supreme Court concluded that the trial judge did not abuse his discretion in permitting the confessions as offered to be presented to the Jury.

Point V.

The summation of the prosecutor was proper.

A.

Descriptive words were justified by the evidence.

The allegations of the impropriety of the prosecutor's summation has heretofore been decided in the Supreme Court of New Jersey. *State v. Johnson*, 31 N. J. 489, 509, 513, 159 A. 2d 11 (1960). At that time the court determined that the graphic summation of the prosecutor was justified by the evidence. The court declared:

> "In his summation, the prosecutor described the crime and the roles taken by the defendants in it. He characterized the defendants collectively as killers, robbers, strong-arm men, and gunmen, and described individual defendants as 'triggerman,' 'ring leader,' 'conniving fingerman,' and the like. We can see nothing in these words that violated the defendants' rights. There was no suggestion by the defendants that the account of the crime contained in the confessions was inaccurate. The prosecutor's description may have been graphic, but it was not unjustified by the evidence. State v. Cioffe, 128 N. J. L. 342 (Sup. Ct. 1942), affirmed per curiam, 130 N. J. L. 160 (E. & A. 1943); State v. Lang, supra. Cf. State v. Siciliano, supra."

This matter was again considered by the New Jersey Supreme Court which, contrary to petitioners' assertions, considered the alleged deprivation of petitioner's constitutional rights. In declaring it was satisfied that petitioners' rights

to a full and fair trial were not denied by the prosecutor's summation, the court opined:

> "The defendants finally contend that the prosecutor's summation to the jury was so inflammatory that it deprived them of *due process of law*. The character of the prosecutor's remarks were fully considered by this court on the defendants' direct appeal and we were completely satisfied that the defendants' right to a full and fair trial was not denied." *State v. Johnson*, 43 N. J. 572, 596, 206 A. 2d 737, 750 (1965). (Emphasis added.)

B.

Prosecutor did not argue for death penalty as a deterrent to others.

Petitioners further contend (Point V) that the prosecutor argued extensively on summation that petitioners should be executed to deter future crime.

Petitioners, during their trial, made no issue of their guilt. Indeed, their attorneys told the jury that petitioners were guilty of the crime with which they were charged. The sole thrust of the defense was to persuade the jury to recommend life imprisonment as opposed to the death penalty.

Petitioners' trial counsel initiated comment concerning the deterrent effects of the death penalty. Counsel for petitioners repeatedly called the jury's attention to the fact that capital punishment is not a deterrent to crime (NJ/JA 266a-267a; NJ/JA 298a-299a). Assuming, arguendo, the prosecutor did argue the deterrent effect of capital punishment, such argument would have been responsive to petitioners' counsels' pleas. The prosecutor invoked the use of the word "deterrent" in the context that it is one of philoso-

phies supporting the concept of punishment and he did not indicate that the death penalty is a deterrent. The prosecutor's mild reference to the word "deterrent" was not used in the same context and is in sharp contrast to the state's summation in *People v. Love*, 56 Cal. 2d 720, 731, 366 P. 2d 33, 39 (1961). In *Love*, the prosecutor stated as a fact the proposition that capital punishment is a more effective deterrent than imprisonment. The gist of *Love* is that an appeal based upon the alleged superiority of capital punishment over imprisonment reaches into improbable and unknown areas. See *People v. Ketchel*, 59 Cal. 2d 503, 381 P. 2d 394 (1963).

Viewing the state's summation in its entirety, it becomes apparent that the prosecutor's comments did not adversely affect petitioners' rights to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.

Point VI.

The alleged delay in arraignment does not invalidate the confessions.

The fact that the defendant is over-detained before arraignment in a state proceeding does not invalidate the confession obtained in the interim. While it is the rule in federal prosecutions that confessions obtained in these circumstances must be suppressed, *Mallory v. United States*, 354 U. S. 449 (1957); *McNabb v. United States*, 318 U. S. 332 (1943), this exclusionary rule is a function of the supervisory power of the federal courts over federal prosecution. *Culombe v. Connecticut*, 367 U. S. 568 (1961); *Stroble v. California*, 343 U. S. 181, 197 (1952); *Gallegos v. Nebraska*, 342 U. S. 55 (1951).

Although petitioners seek to raise *McNabb* to the dimen-

sions of a constitutional interdiction, this court has heretofore held that the Fourteenth Amendment does not prohibit a state from such detention and examination of a suspect, but for which, all the other circumstances, is found not to be coercive. The *McNabb-Mallory* rule does not rise to the dignity of a constitutional prohibition. *Culombe v. Connecticut*, supra.

Moreover, even if this court should declare the *McNabb-Mallory* rule applicable to the states, since that rule is not predicated upon the issue of the unreliability of the evidence obtained during illegal detention, the rule should not be applied to the trial of this case which occurred in January, 1959. See Respondent's discussion under similar application of *Escobedo* (Point I).

CONCLUSION.

On the basis of the aforesaid law and arguments, the State respectfully submits that the defendants, Johnson and Cassidy received a fair and impartial trial and that the convictions should be affirmed.

Respectfully submitted,

NORMAN HEINE,
Camden County Prosecutor,
Counsel for Respondent.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 762

SYLVESTER JOHNSON and STANLEY CASSIDY,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONERS' REPLY BRIEF

Argument

After the Brief for Petitioners in this case had been submitted to the printer, this Court announced its decision in *Tehan* v. *Shott*, —— U.S. ——, 15 L.ed.2d 453 (January 19, 1966). That decision, as well as some of the arguments contained in the Brief for Respondents, compel a short reply.

1. In light of this Court's decision in *Tehan* v. *Shott*, *supra*, it would be futile for Petitioners to persist in the argument that the decisions of this Court in *Malloy* v. *Hogan*, 378 U.S. 1 (1964) and *Griffin* v. *California*, 380

U.S. 609 (1965) (concluding that the Fifth and Fourteenth Amendments prohibit comment by the prosecutor on the failure of the accused to take the stand), are applicable to cases in which final judgment had been rendered prior to either of those decisions. Accordingly, Petitioners have abandoned that portion of the argument set forth in Point II of the Brief for Petitioners.

However, here the prosecutor's remarks went beyond the reasonable comment prohibited by *Griffin*. The comment of the prosecutor went beyond merely suggesting reasonable inferences to be drawn from the failure of defendants to take the stand or to present evidence. The prosecutor suggested to the jury untrue inferences to be drawn from that failure not justified by any facts in evidence. Thus, his comments [T.R. 255-256, 305], bolstered by the Court's charge on permissible inferences [T.R. 332], reinforces the argument set forth in Point V of the Brief for Petitioners, that the "totally inflammatory nature" of those remarks and summation deprived Petitioners of a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. As argued in the Brief for Petitioners, the comments made by the prosecutor and the trial court were demonstrably more prejudicial and inflammatory than the remarks involved in the *Tehan* case, since they not only related to a lack of defense, but they suggested that defendants were not even sorry about the crime. It is submitted that by the use of a trained and fertile imagination the prosecutor was able to suggest to the jury inferences not arising from any evidence but merely from failure of defendants to testify or present evidence—inferences which may be just as untrue as facts obtained by coerced confessions. These comments by the prosecutor considered in conjunction with

the misstatements and factual distortions contained in his summation, amounted to a violation of due process. See Brief for Petitioners, p. 41, and note 21.

Nothing said by this Court in *Tehan* v. *Shott, supra,* prevents a collateral attack on a conviction where the prosecutor uses inflammatory and intemperate language including wholly unsupported inferences in his summation. Use of such techniques may "infect a criminal proceeding with the clear danger of convicting the innocent." *Tehan* v. *Shott, supra,* 15 L.ed.2d at 460. The basic principle underlying such an attack is identical with that allowing attack on a coerced confession: see *Jackson* v. *Denno,* 378 U.S. 368 (1964); without regard for the truth or falsity of the confession: *Rogers* v. *Richman,* 365 U.S. 534 (1961); and even though there is ample evidence aside from the confession to support the conviction. *Malinski* v. *N. Y.,* 324 U.S. 401 (1945); *Strahle* v. *Calif.,* 343 U.S. 181 (1952); *Payne* v. *Arkansas,* 356 U.S. 560 (1958).

2. Respondent expresses the fear that if accused persons are advised of their right to counsel, and if they obtain counsel, it would be the duty of counsel to protect their clients, guilty or innocent, which would in effect eliminate police interrogations. To state this argument is virtually to reduce it to a logical absurdity. The Respondent is in effect suggesting that the necessity of police interrogation outweighs rights granted by the Constitution and duties imposed on attorneys by their professional ethics. As noted by this Court in *Escobedo*:

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the

> long run, be less reliable [fn. omitted] and more subject to abuse [fn. omitted] than a system which depends on extrinsic evidence independently secured through skillful investigation." 378 U.S. at 488-489, 12 L.ed.2d at 985.

In addition, this argument is factually unsound. The Brief as Amicus Curiae of the National District Attorneys Association offers statistics purporting to show that confessions are essential to effective police enforcement. The statistics offered, however, do not prove the point. They simply show that in the vast majority of cases tried, confessions are used. The statistics are not geared in terms of arrest; thus they do not show the numbers of cases which do not reach prosecution because confessions are not obtained. They do not disclose the techniques used to obtain the confessions, nor whether the convictions obtained thereby are ultimately reversed because of those techniques.

Nor do they demonstrate that a proper warning as to the constitutional rights of the accused will in any way limit the number of confessions obtained. In fact, although sufficient empirical data is not yet available, figures collected by the Philadelphia Police Department and the District Attorney's Office (compiled, in fact, under the direction of the same Assistant District Attorney who provided the data for Pennsylvania contained in the *National District Attorneys Association's Brief*, p. 38a) shows that the *Escobedo* decision did not reduce the effectiveness of police interrogations.

"Rule That Suspects Must be Warned of Right to Lawyer Fails to Reduce Confessions.

by Paul F. Levy
of the Bulletin Staff

Warning suspects of their right to legal counsel before questioning them has not sharply reduced the effectiveness of police in obtaining confessions and incriminating statements.

In fact, figures collected by the police department and district attorney's office indicated that even after such warnings, the majority of suspects are still talking themselves into jail.

The figures, while only for a two-weeks period, appear to refute the statements of law and officials that recent federal court decisions requiring such warnings would 'wreak catastrophic havoc' on police.

Involves 208 Cases.

Collected by the police during the weeks of Oct. 17 and Oct. 24 the figures indicated that even after police warned suspects of their right to a lawyer, two-thirds refused the aid and confessed on their own.

The figures were collected in 208 cases, ranging from car theft to homicide, in which a suspect was questioned by police.

In only one category, robberies, did the majority of suspects refuse to talk without a lawyer after being warned that they had such a right.

Assistant District Attorney Richard A. Sprague, who is analyzing the figures after they are collected by Chief Inspector Harry G. Fox, head of the detective divison, said a 'longer period of time (than two weeks)

will be needed before we can see the full effect of such warnings.'

'But so far it isn't as great a percentage (of suspects refusing to talk) as we originally believed,' he added.

According to the first dire prediction by law enforcement officials, almost every criminal would have refused to talk and walked out free.

The prosecutors associations made the claim in a petition asking the U. S. Circuit Court of Appeals for the Third Circuit, which laid down the requirement that suspects be warned of their right to counsel, to reverse itself. The court refused.

The police figures, which tend to refute this claim, ironically were collected in preparation for inclusion in a brief to be filed with the U. S. Supreme Court if the case reaches that level.

Of the 208 suspects questioned by police during the two-week period, the figures show 136 still gave police a confession after being warned not only of their right to counsel, but of their right to remain silent even without counsel present.

Of the 12 homicide suspects questioned during the two weeks, only three refused to talk. The nine gave complete confessions to police.

Of the 15 rape suspects, three refused to talk and 12 confessed.

Of the 27 car theft suspects, three refused to talk and 24 confessed.

Of the 57 theft suspects, 20 refused to talk and 37 confessed.

Of the 48 burglary suspects, 21 refused to talk and 27 confessed.

The only category where a majority of the suspects refused to talk was in robberies, where 19 of the 25

about to be questioned refused to talk to police until they conferred with a lawyer.

After conferring, Sprague pointed out, none of the 19 talked further to police.

A preliminary analysis of the figures, Sprague said, 'tends to support the theory that where the warning hurts law enforcement is with the professional criminal—the burglar or robber—who is more likely to understand the implication of such a warning.'"

The Philadelphia Evening Bulletin, Wednesday, Nov. 17, 1965, p. 35.

3. Respondent argues that *Escobedo* should not be applied "retroactively" since it represents a new constitutional principle, and that these convictions were not based on a "probable or even a possible false confession" (Brief for Respondents pp. 19-20). This argument is based on a misreading of *Escobedo* and a false factual premise.

As already noted in our principal brief, *Escobedo* did not announce radical new constitutional doctrine. It merely refined and extended the definition of the "stage when legal aid and advice are surely needed". *Escobedo* v. *Illinois*, 278 U.S. 478, 488, 12 L.ed.2d 977, 984 (1964), citing *Massiah* v. *United States*, 377 U.S. at 204, 12 L.ed.2d at 249 (1964).

The incorrect factual premise on which this argument rests is that the confessions were true. In the first post-trial motion it was argued that these confessions were untrue in admitting homicide during the course of a robbery. It was argued that those portions were "fed" to Petitioners who were mentally and psychologically unequipped to evaluate and reject them. In their psychological and mental conditions, and with their limited education and weak psy-

chological backgrounds, Petitioners could easily accept the police suggestion that a robbery was involved, since admitting to a robbery would have seemed so minor a matter compared to admitting to a homicide. They could not have known the legal significance of the felony-murder doctrine. This emphasizes the necessity for legal advice at that stage of the interrogation.

The later futile attempts of trial counsel to gain sympathy and leniency for their clients by arguing to the jury that their clients "cooperated" and "told the truth" in their statements cannot be considered as admissions that the statements were true and freely given—but merely demonstrated their desperation when faced with such damaging confessions. The fact that at the time the confessions were transcribed petitioners were told—in fact, almost threatened—that the statements must be truthful and given of their own free will, but without any warning as to their right to remain silent or consult counsel, did nothing to assure truthful, voluntary statements. The admissions concerning robbery had already been obtained orally after many hours of persistent questioning, psychological and even physical pressures, as well as "feeding" of those admissions. The recording of the statements was a mere formality; and the stock (albeit incomplete) recitation of "constitutional rights" merely gave the appearance of legality to a *fait accompli*.

4. In attempting to justify the refusal of the trial court to grant a severance and separate trials or to strike out objectionable and hearsay references, the Respondent says only that this is a matter for the discretion of the trial court, and that separate trials would have been expensive.

This argument assumes that the only remedy would have been separate trials. It overlooks the other remedy suggested—the remedy of deleting cross-incriminating references from the confessions. See *People* v. *Aranda*, —— Cal.2d ——, 34 U.S.L. Week 2261 (Nov. 12, 1964); *State* v. *Young*, 215 A.2d 352 (N.J. Sup. Ct. Dec. 20, 1965). Furthermore, the economy and expedition achievable by a single trial are not goals to be sought at the cost of constitutional rights of defendants to have a trial free from the prejudicial effect of hearsay incriminating statements of co-defendants. See *People* v. *Krugman*, 252 N.Y.S.2d 846 (Sup. Ct. N.Y. Crim. Term, Kings Cty., Part 1, 1964).

Conclusion

For all of the reasons set out above, as well as those contained in the Brief for Petitioners, it is respectfully submitted that the judgment of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

STANFORD SHMUKLER
M. GENE HAEBERLE

Counsel for Petitioners

Of Counsel:

CURTIS R. REITZ

SUPREME COURT OF THE UNITED STATES

No. 762.—October Term, 1965.

Sylvester Johnson and Stanley Cassidy, Petitioners, v. State of New Jersey.	On Writ of Certiorari to the Supreme Court of the State of New Jersey.

[June 20, 1966.]

Mr. Chief Justice Warren delivered the opinion of the Court.

In this case we are called upon to determine whether *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and *Miranda* v. *Arizona*, *ante*, p. ——, should be applied retroactively. We hold that *Escobedo* affects only those cases in which the trial began after June 22, 1964, the date of that decision. We hold further that *Miranda* applies only to cases in which the trial began after the date of our decision one week ago. The convictions assailed here were obtained at trials completed long before *Escobedo* and *Miranda* were rendered, and the rulings in those cases are therefore inapplicable to the present proceeding. Petitioners have also asked us to overturn their convictions on a number of other grounds, but we find these contentions to be without merit, and consequently we affirm the decision below.

Petitioner Cassidy was taken into custody in Camden, New Jersey, at 4 a. m. on January 29, 1958, for felony murder. The police took him to detective headquarters and interrogated him in a systematic fashion for several hours. At 9 a. m. he was brought before the chief detective, two other police officers, and a court stenographer. The chief detective introduced the persons present, informed Cassidy of the possible charges against him, gave

him the warning set forth in the margin,[1] concluded that he understood the warning, and obtained his consent to be questioned. Cassidy was then interrogated until 10:25 a. m. and made a partial confession to felony murder. The stenographer recorded this interrogation and read it back to Cassidy for his acknowledgment. Police officers then took him to another part of the building and apparently questioned him further. At 12:15 p. m. he was brought back to the chief detective's office for another half-hour of recorded interrogation. Under circumstances similar to those already described, Cassidy amended his confession to add vital incriminating details. For the next 11 hours he was held in a detention room and may have been subjected to further questioning. At 11:40 p. m. the police returned him to the chief detective's office for a final brief round of recorded interrogation. Taken together, Cassidy's three formal statements added up to a complete confession of felony murder, and they were later introduced against him at his trial for that crime.

While the present collateral proceeding was pending following our decision in *Escobedo*, Cassidy filed affidavits in the New Jersey Supreme Court which detailed for the first time certain supposed circumstances of his confession. In his own affidavit, he claimed that on at least five separate occasions during his interrogation, he asked for permission to consult a lawyer or to contact relatives. The police allegedly either ignored these requests or told him that he could not communicate with others until his statement was completed. Cassidy also

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[1] "I am going to ask you some questions as to what you know about the hold-up, but before I ask you these questions it is my duty to warn you that everything you tell me must be of your own free will, must be the truth, without any promises or threats having been made to you, and knowing anything you tell me can be used against you, or any other person, at some future time."

produced affidavits from his mother, his uncle, and his aunt, claiming that during this period they called the detective headquarters at least three times and once appeared there in person, seeking information about Cassidy and an opportunity to speak with him. Their efforts allegedly were thwarted by the police. These belated claims were left uncontroverted by the State and were accepted as true by the court below for purposes of the *Escobedo* issue.

The police took petitioner Johnson into custody in Newark, New Jersey, at 5 p. m. on January 29, 1958, for the same crime as Cassidy. He was taken to detective headquarters and was booked. Later in the evening the police brought him before a magistrate for a brief preliminary hearing. The record is unclear as to what transpired there. Both before and after the appearance in court, he was questioned in a routine manner. At 2 a. m. the police drove Johnson by auto to Camden, the scene of the homicide, 80 miles from Newark. During the auto ride he was again interrogated about the crime. Upon arrival in Camden at about 4:30 a. m., the police took him directly to detective headquarters and brought him before the chief detective, three other police officers, and a court stenographer. As in Cassidy's case, Johnson was introduced to the persons present, informed of the possible charges against him, and given the same warning already set forth. He stated that he understood the warning and was willing to be questioned under those conditions. The police then interrogated him until 6:20 a. m., a period of about one and one-half hours. During the course of the questioning, he made a full confession to the crime of felony murder. This interrogation was recorded by the stenographer and read back to Johnson for his acknowledgment.

Like Cassidy, Johnson filed affidavits in the New Jersey Supreme Court in this collateral proceeding following

our decision in *Escobedo*, detailing for the first time certain supposed circumstances of his confession. In his own affidavit, he claimed that at four separate points during the period described above, he asked for permission to consult a lawyer or to contact relatives so that they could obtain a lawyer for him. As in Cassidy's case, the police allegedly either ignored these requests or told him that he could not communicate with others until he had given a statement. Johnson also produced affidavits from his mother and his girl friend, claiming that on three occasions after the homicide and prior to the confession, they called detective headquarters or went there in person, seeking information about Johnson and an opportunity to speak with him. Their efforts allegedly were rebuffed by the police. These belated claims, like Cassidy's, were left uncontroverted by the State and were accepted as true by the court below for resolution of the *Escobedo* issue.

The confessions of Johnson and Cassidy were offered in evidence by the State at their joint trial for felony murder. The judge held a hearing out of the presence of the jury on the voluntariness of the confessions. Petitioners made no effort to rebut the testimony adduced by the State relating to this issue. The judge found the confessions voluntary and admitted them into evidence. Petitioners then expressly relinquished their right under state law to have the issue of voluntariness, and the accompanying evidence, submitted to the jury for redetermination.[2] They did not introduce any testimony to dispute the correctness of their confessions.

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[2] The procedure prescribed by state law was outlined in the opinion below as follows:

"Under the New Jersey procedure for the admission in evidence of a confession, the trial judge must first determine whether the confession was voluntary. If he finds the confession to be voluntary, and hence admissible, he instructs the jury to also consider the

In summation at the close of trial, defense counsel explicitly asserted that the confessions were truthful and pleaded for leniency on this ground. Cassidy's lawyer stated to the jury:

> "Whatever is in this statement made by Stanley Cassidy is true. I know it is true. . . . [M]y reason for knowing that it is true is because of the meetings and consultations I have had with Stanley. We have been over this many, many times.
>
> "I know it is true because I know Chief Dube, and Chief Dube is a fine interrogator. If you do not answer truthfully, believe me, he will question you until he does get the truth, and Chief Dube got the truth."

Likewise Johnson's lawyer told the jury:

> "The statement of Johnson was truthful and honest, because when that was finished, that was the end of it.
>
> . . . . .
>
> "There were no threats. There was no attempt to evade. There was no trickery. Anything that Chief Dube asked him he answered honestly and truthfully."

The jury found Johnson and Cassidy guilty of murder in the first degree without recommendation of mercy, and they were sentenced to death.[2]

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voluntariness of the confession and to disregard it unless the State proves it was voluntarily given." 43 N. J. 572, 586, n. 9, 206 A. 2d 737, 744–745, n. 9.

[2] A third defendant, Wayne Godfrey, was also found guilty and sentenced to death. His conviction was subsequently overturned by a federal court in post-conviction proceedings. Upon retrial for felony murder, he pleaded *non vult* and was sentenced to life imprisonment.

The convictions of Johnson and Cassidy became final six years ago, when the New Jersey Supreme Court affirmed them upon direct appeal[4] and the time expired for petitioners to seek certiorari from the decision. There followed a battery of collateral attacks in state and federal courts, based on new factual allegations, in which petitioners repeatedly and unsuccessfully assailed the voluntariness of their confessions.[5] This appeal arises out of still another application for post-conviction relief, accompanied by a fresh set of factual allegations, in which petitioners have argued in part that their confessions were inadmissible under the principles of *Escobedo*. The court below rejected the claim, holding that *Escobedo* did not affect convictions which had become final prior to the date of that decision,[6] and it is this holding which we are principally called upon to review. In view of the standards announced one week ago concerning the warnings which must be given prior to in-custody interrogation, this case also obliges us to determine whether *Miranda* should be accorded retroactive application.

In the past year we have twice dealt with the problem of retroactivity in connection with other constitutional rules of criminal procedure. *Linkletter* v. *Walker*, 381 U. S. 618 (1965); *Tehan* v. *Shott*, 382 U. S. 406 (1966). These cases establish the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective . . .

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[4] *State* v. *Johnson*, 31 N. J. 489, 158 A. 2d 11 (1960).

[5] *State* v. *Johnson*, 63 N. J. Super. 16, 163 A. 2d 593 (1960), aff'd, 34 N. J. 212, 168 A. 2d 1, cert. denied, 368 U. S. 933 (1961); *United States ex rel. Johnson* v. *Yeager*, 327 F. 2d 311 (C. A. 3d Cir.), cert. denied, 377 U. S. 984 (1964). See also *State* v. *Johnson*, 71 N. J. Super. 506, 177 A. 2d 312, aff'd, 37 N. J. 19, 179 A. 2d 1, cert. denied, 370 U. S. 928 (1962).

[6] 43 N. J. 572, 206 A. 2d 737.

where the exigencies of the situation require such an application." 381 U. S., at 628; 382 U. S., at 410. These cases also delineate criteria by which such an issue may be resolved. We must look to the purpose of our new standards governing police interrogation, the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application of *Escobedo* and *Miranda*. See 381 U. S., at 636; 382 U. S., at 413.

In *Linkletter* we declined to apply retroactively the rule laid down in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), by which evidence obtained through an unreasonable search and seizure was excluded from state criminal proceedings. In so holding, we relied in part on the fact that the rule affected evidence "the reliability and relevancy of which is not questioned." 381 U. S., at 639. Likewise in *Tehan* we declined to give retroactive effect to *Griffin* v. *California*, 380 U. S. 609 (1965), which forbade prosecutors and judges to comment adversely on the failure of a defendant to testify in a state criminal trial. In reaching this result, we noted that the basic purpose of the rule was to discourage courts from penalizing use of the privilege against self-incrimination. 382 U. S., at 414.

As *Linkletter* and *Tehan* acknowledged, however, we have given retroactive effect to other constitutional rules of criminal procedure laid down in recent years, where different guarantees were involved. For example, in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), which concerned the right of an indigent to the advice of counsel at trial, we reviewed a denial of habeas corpus. Similarly, *Jackson* v. *Denno*, 378 U. S. 368 (1964), which involved the right of an accused to effective exclusion of an involuntary confession from trial, was itself a collateral attack. In each instance we concluded that retroactive application was justified because the rule affected

"the very integrity of the fact-finding process" and averted "the clear danger of convicting the innocent." *Linkletter* v. *Walker*, 381 U. S., at 639; *Tehan* v. *Shott*, 382 U. S., at 416.

We here stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved. The right to be represented by counsel at trial, applied retroactively in *Gideon* v. *Wainwright*, *supra*, has been described by Justice Schaefer of the Illinois Supreme Court as "by far the most pervasive . . . of all of the rights that an accused person has."[7] Yet Justice Brandeis even more boldly characterized the immunity from unjustifiable intrusions upon privacy, which was denied retroactive enforcement in *Linkletter*, as "the most comprehensive of rights and the right most valued by civilized men."[8] To reiterate what was said in *Linkletter*, we do not disparage a constitutional guarantee in any manner by declining to apply it retroactively. See 381 U. S., at 629.

We also stress that the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. Accordingly as *Linkletter* and *Tehan* suggest, we must determine retroactivity "in each case" by looking to the peculiar traits of the specific "rule in question." 381 U. S., at 629; 382 U. S., at 410.

Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does

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[7] Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).

[8] *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (dissenting opinion).

not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. We gave retroactive effect to *Jackson* v. *Denno*, *supra*, because confessions are likely to be highly persuasive with a jury, and if coerced they may well be untrustworthy by their very nature.[9] On the other hand, we denied retroactive application to *Griffin* v. *California*, *supra*, despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand. We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial.

Having in mind the course of the prior cases, we turn now to the problem presented here: whether *Escobedo* and *Miranda* should be applied retroactively.[10] Our opinion in *Miranda* makes it clear that the prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice. See, *ante*, pp. 20–29. They are designed in part to assure that the per-

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[9] Coerced confessions are, of course, inadmissible regardless of their alleged truth or falsity. See *Rogers* v. *Richmond*, 365 U. S. 534 (1961).

[10] It appears that every state supreme court and federal court of appeals which has discussed the question has declined to apply the tenets of *Escobedo* retroactively. For example, see *In re Lopez*, 62 Cal. 2d 368, 42 Cal. Rptr. 188, 398 P. 2d 380 (1965); *Ruark* v. *People*, — Colo. —, 405 P. 2d 751 (1965); *Commonwealth* v. *Negri*, 419 Pa. 117, 213 A. 2d 670 (1965); *United States ex rel. Walden* v. *Pate*, 350 F. 2d 240 (C. A. 7th Cir. 1965). The commentators, however, are divided on this issue. Compare Mishkin, Forward: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965), which opposes retroactive application, with Comment, *Linkletter, Shott*, and the Retroactivity Problem in *Escobedo*, 64 Mich. L. Rev. 832 (1966).

son who responds to interrogation while in custody does so with intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it. In this respect the rulings secure scrupulous observance of the traditional principle, often quoted but rarely heeded to the full degree, that "[t]he law will not suffer a prisoner to be made the deluded instrument of his own conviction."[11] Thus while *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion.

At the same time, our case law on coerced confessions is available for persons whose trials have already been completed, providing of course that the procedural prerequisites for direct or collateral attack are met. See *Fay* v. *Noia*, 372 U. S. 391 (1963). Prisoners may invoke a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years. See *Reck* v. *Pate*, 367 U. S. 433 (1961). That test now takes specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance. See *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Spano* v. *New York*, 360 U. S. 315 (1959). Prisoners are also entitled to present evidence anew on this aspect of the voluntariness of their confessions if a full and fair hearing has not already been afforded them. See *Townsend* v. *Sain*, 372 U. S. 293 (1963). Thus while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim.

[11] 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824).

Nor would retroactive application have the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed. We have pointed out above that past decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confessions. See *Haynes* v. *Washington*, *supra*; *Spano* v. *New York*, *supra*. Prior to *Escobedo* and *Miranda*, however, we had expressly declined to condemn an entire process of in-custody interrogation solely because of such conduct by the police. See *Crooker* v. *California*, 357 U. S. 433 (1958); *Cicenia* v. *Lagay*, 357 U. S. 504 (1958). Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda*. This is in favorable comparison to the situation before *Mapp* v. *Ohio*, 367 U. S. 643 (1961), where the States at least knew that they were constitutionally forbidden from engaging in unreasonable searches and seizures under *Wolf* v. *Colorado*, 338 U. S. 25 (1949).

At the same time, retroactive application of *Escobedo* and *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards. Prior to *Escobedo* and *Miranda*, few States were under any enforced compulsion on account of local law to grant requests for the assistance of counsel or to advise accused persons of their privilege against self-incrimination. Compare *Crooker* v. *California*, 357 U. S., at 448, n. 4 (dissenting opinion). By comparison, *Mapp* v. *Ohio*, *supra*, was already the law in a majority of the States at the time it was rendered, and only six States were imme-

diately affected by *Griffin* v. *California*, 380 U. S. 609 (1965). See *Tehan* v. *Shott*, 382 U. S., at 418.

In the light of these various considerations, we conclude that *Escobedo* and *Miranda*, like *Mapp* v. *Ohio*, *supra*, and *Griffin* v. *California*, *supra*, should not be applied retroactively. The question remains whether *Escobedo* and *Miranda* shall affect cases still on direct appeal when they were decided or whether their application shall commence with trials begun after the decisions were announced. Our holdings in *Linkletter* and *Tehan* were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced. See 381 U. S., at 622 and n. 4; 382 U. S., at 409, n. 3. On the other hand, apart from the application of the holdings in *Escobedo* and *Miranda* to the parties before the Court in those cases, the possibility of applying the decisions only prospectively is yet an open issue.

All of the reasons set forth above for making *Escobedo* and *Miranda* non-retroactive suggest that these decisions should apply only to trials begun after the decisions were announced. Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test. Law enforcement officers and trial courts will have fair notice that statements taken in violation of these standards may not be used against an accused. Prospective application only to trials begun after the standards were announced is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory.

Consequently they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege. In these circumstances, to upset all of the convictions still pending on direct appeal which were obtained in trials preceding *Escobedo* and *Miranda* would impose an unjustifiable burden on the administration of justice.

At the same time, we do not find any persuasive reason to extend *Escobedo* and *Miranda* to cases tried before those decisions were announced, even though the cases may still be on direct appeal. Our introductory discussion in *Linkletter*, and the cases cited therein, have made it clear that there are no jurisprudential or constitutional obstacles to the rule we are adopting here. See 381 U. S., at 622–629. In appropriate prior cases we have already applied new judicial standards in a wholly prospective manner. See *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964); *James* v. *United States*, 366 U. S. 213 (1961). Nor have we been shown any reason why our rule is not a sound accommodation of the principles of *Escobedo* and *Miranda*.

In the light of these additional considerations, we conclude that *Escobedo* and *Miranda* should apply only to cases commenced after those decisions were announced. We recognize that certain state courts have perceived the implications of *Escobedo* and have therefore anticipated our holding in *Miranda*. Of course, States are still entirely free to effectuate under their own law stricter standards than those we have laid down and to apply those standards in a broader range of cases than is required by this decision.

Apart from its broad implications, the precise holding of *Escobedo* was that statements elicited by the police

during an interrogation may not be used against the accused at a criminal trial,

> "[where] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent . . . ." 378 U. S., at 490–491.

Because *Escobedo* is to be applied prospectively, this holding is available only to persons whose trials began after June 22, 1964, the date on which *Escobedo* was decided.

As for the standards laid down one week ago in *Miranda*, if we were persuaded that they had been fully anticipated by the holding in *Escobedo*, we would measure their prospectivity from the same date. Defendants still to be tried at that time would be entitled to strict observance of constitutional doctrines already clearly foreshadowed. The disagreements among other courts concerning the implications of *Escobedo*,[13] however, have impelled us to lay down additional guidelines for situations not presented by that case. This we have done in *Miranda*, and these guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966. See *Tehan* v. *Shott*, 382 U. S., at 409,

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[13] For example, compare *People* v. *Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), and *People* v. *Dufour*, — R. I. —, 206 A. 2d 82 (1965), which construe *Escobedo* broadly, with *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964), and *Browne* v. *State*, 24 Wis. 2d 491, 131 N. W. 2d 169 (1964).

n. 3, with reference to *Malloy* v. *Hogan*, 378 U. S. 1 (1964), and *Griffin* v. *California*, *supra*.

Petitioners challenge the validity of their convictions on several other grounds, all of which we have examined with great care, including the claim that their confessions were coerced. We conclude without unnecessary discussion that those grounds which may be tested on this direct review of the judgment of the New Jersey Supreme Court are without merit. We further find that petitioners' contentions relating to the voluntariness of their confessions are beyond the scope of our direct review in this proceeding.

Petitioners' coerced confession claim was fully litigated and rejected both at trial and in prior post-conviction hearings in the state courts. On neither occasion, however, did petitioners attempt to substantiate certain allegations made for the first time in the present proceeding. As stated above, petitioners now assert that they were prevented from obtaining outside assistance while they were being interrogated. The police allegedly refused them access to their families or a lawyer and also thwarted the efforts of their relatives and friends to contact them. We have already pointed out that allegations of this kind are directly relevant to a coerced confession claim and that such a claim presents no problem of retroactivity. See also *Davis* v. *North Carolina*, *post*, p —.

The New Jersey Supreme Court invoked a state procedural rule, previously applied in another confession case, as a bar to reconsideration of petitioners' coerced confession claim, even in the light of their new allegations regarding the denial of outside assistance. See N. J. R. R. 3:10A–5 (1965 Supp.); *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 669 (1964). This is an adequate state ground which precludes us from testing the coerced confession claim on the present review, whatever may

be the significance of the state court's reliance on its procedural rule in federal habeas corpus proceedings. See *Fay* v. *Noia*, 372 U. S. 391 (1963).

The judgment of the Supreme Court of New Jersey is

Affirmed.

MR. JUSTICE CLARK concurs in the opinion and judgment of the Court. He adheres, however, to the views stated in his separate opinion in *Miranda* v. *Arizona*, *ante*, p. —.

MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE concur in the opinion and judgment of the Court. They continue to believe, however, for the reasons stated in the dissenting opinions of MR. JUSTICE HARLAN and MR. JUSTICE WHITE in *Miranda* v. *Arizona* and its companion cases, — U. S. —, that the new constitutional rules promulgated in those cases are both unjustified and unwise.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissents from the Court's holding that the petitioners here are not entitled to the full protections of the Fifth and Sixth Amendments as this Court has construed them in *Escobedo* v. *Illinois*, 378 U. S. 478, and *Miranda* v. *Arizona*, *ante*, p. —, for substantially the same reasons stated in their dissenting opinion in *Linkletter* v. *Walker*, 381 U. S. 618, at 640.